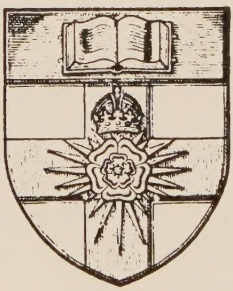
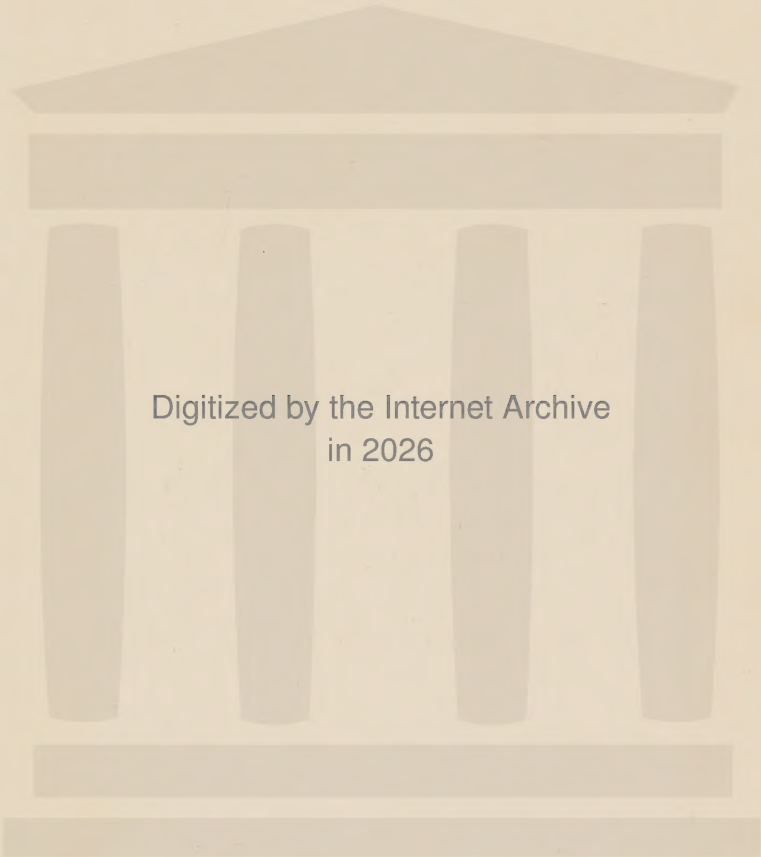
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

Mx North
346·4
Reference Only



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1920_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—H. F. DICKENS, Esq., K.C.
Vice-Chairman—T. R. HUGHES, Esq., K.C.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR GORDON HEWART, M.P. ATTORNEY-GENERAL.
RIGHT HON. SIR E. M. POLLOCK, M.P. SOLICITOR-GENERAL.
CHARLES HENRY MORTON, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. TOMLIN, Esq., K.C. W. R. SHELDON, Esq.	Lincoln's Inn.
H. F. DICKENS, Esq., K.C. SIR HUGH FRASER.	Inner Temple.
C. C. SCOTT, Esq., K.C. A. MACMORRAN, Esq., K.C.	Middle Temple.
SIR LEWIS COWARD, K.C. EDWARD CLAYTON, Esq., K.C.	Gray's Inn.
T. R. HUGHES, Esq., K.C., of Lincoln's Inn. E. W. HANSELL, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. MELMOTH WALTERS, Esq. (Firm—Messrs. Walters & Co.). J. W. BUDD, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. NOBLE FAWCETT, Esq., 30, Montague Street, W.C. 1.

1920.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

	REPORTERS.	
Court of Appeal	W. F. BARRY, W. H. GRIFFITH,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases.	J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, J. S. HENDERSON, R. F. STUBBING, J. RITCHIE,	*Barristers-at-Law.*
Bankruptcy Cases	J. E. ALDOUS,	*Barrister-at-Law.*

1920.—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1920.

Lord BIRKENHEAD, Lord Chancellor.

Earl of READING, Lord Chief Justice of England.

Lord STERNDALE, Master of the Rolls.

Sir J. ELDON BANKES, Sir T. ROLLS WARRINGTON, Sir T. E. SCRUTTON, Sir J. R. ATKIN, Sir R. YOUNGER,	Lords Justices of the Court of Appeal.
Sir H. E. DUKE,	President of the Probate, Divorce, and Admiralty Division.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1920.

Earl of Reading, Lord Chief Justice of England, President.
Sir Charles John Darling, Knt.
Sir Reginald More Bray, Knt.
Sir Alfred Tristram Lawrence, Knt.
Lord Coleridge.
Sir Horace Edmund Avory, Knt.
Sir Thomas Gardner Horridge, Knt.
Sir Charles Montague Lush, Knt.
Sir Sidney Arthur Taylor Rowlatt, Knt.
Sir Clement Meacher Bailhache, Knt.
Sir Montague Shearman, Knt.
Sir John Sankey, Knt.
Sir Henry Alfred McCardie, Knt.
Sir Arthur Clavell Salter, Knt.
Sir Alexander Adair Roche, Knt.
Sir Frederick Arthur Greer, Knt.
Sir Rigby Philip Watson Swift, Knt.
Sir Edward Acton, Knt.

ATTORNEY-GENERAL :

Sir Gordon Hewart, Knt.

SOLICITOR-GENERAL :

Sir Ernest Murray Pollock, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
93	footnote (4)	[1900] 21 Ch. D. 871	[1900] 1 Q. B. 133.
300	„ (3)	[1919] A. C.	[1918] A. C.
308	3	Carswell	Casswell.
416	footnote (1)	(1863) L. R. 8 H. L.	(1868) L. R. 3 H. L.
437	„ (1)	1 Q. B.	[1893] 1 Q. B.
538	2 (from bottom)	Sir J. Simon K.C., also appeared for Appellants.	
618	„ (1)	[1919] 2 R. I.	[1919] 2 I. R.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1920, will be as follows:—

In the First Series,
[1920] 1 Ch. [1920] 2 Ch.

In the Second Series,
[1920] 1 K. B. [1920] 2 K. B. [1920] 3 K. B. [1920] P.

In the Third Series,
[1920] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME.

A.

	PAGE
Anglo-Newfoundland Development Company *v.* The King (C. A.)	214
Armour & Co., Fisher, Reeves & Co. *v.*	329
Attorney-General, Ex parte. Rex *v.* Cumberland Justices	630
———, Ex parte. Rex *v.* Suter	630
Attwood *v.* Lamont	146

B.

Baker *v.* Lloyds Bank	322
Barry *v.* van den Hurk	709
Barwick *v.* South Eastern and Chatham Railway Companies	387
Bedford College *v.* Guest (C. A.)	278
Bedfordshire County Council, Rex *v.* Ex parte Sear	465
Belgian Grain and Produce Company, Wilson, Holgate & Co. *v.*	1
Belvedere Fish Guano Company *v.* Rainham Chemical Works (C. A.)	487
Blackler, Hartell *v.*	161
Blott, Inland Revenue Commissioners *v.* (C. A.)	657
Bourne, Sedgwick *v.*	267
Bradford Corporation *v.* Webster	135
Braintree Union, Tendring Union *v.*	647
British and Foreign Insurance Company, Wilson Shipping Company *v.* (C. A.)	25
Burchell *v.* Thompson (C. A.)	80

C.

Calf and Sun Insurance Office, In re (C. A.)	366
Carpenter *v.* Finsbury Borough Council	195
Chemical Works (Rainham), Belvedere Fish Guano Company *v.* Ind, Coope & Co. *v.* Same (C. A.)	487
Cole *v.* Kelly (C. A.)	106
Compañia Naviera Sota y Aznar, Ralli Brothers *v.* (C. A.)	287
Crispin & Co., Lebeaupin *v.*	714
Cumberland Justices, Rex *v.* Ex parte Attorney-General	630

D.

Dainton, Redmond *v.*	256
Dey *v.* Mayo (C. A.)	346
Di Ferdinando *v.* Simon, Smits & Co.	704
Dymond, Rex *v.* (C. C. A.)	260

E.

PAGE
Eaglesham *v.* McMaster 169
Eden, In re. Watkins *v.* Eden (C. A.) 333
—— Watkins *v.* In re Eden (C. A.) 333
Elliott Steam Tug Company *v.* Payne & Co. 693
Enever, Evans *v.* 315
England *v.* Inglis 636
Evans *v.* Enever 315

F.

Finsbury Borough Council, Carpenter *v.* 195
Fish Guano (Belvedere) Company *v.* Rainham Chemical Works (C. A.) 487
Fisher, Rothschild *v.* (C. A.) 243
——— Reeves & Co. *v.* Armour & Co. 329
Foster *v.* Great Eastern Railway Company (C. A.) 574

G.

Godfrey, Ritter *v.* (C. A.) 47
Gore-Booth *v.* Manchester (Bishop) 412
Gould *v.* South Eastern and Chatham Railway Company 186
Grain and Produce (Belgian) Company, Wilson, Holgate & Co. *v.* 1
Great Eastern Railway Company, Foster *v.* (C. A.) 574
Greenwood, Inland Revenue Commissioners *v.* (C. A.) 657
Grunwaldt, Ex parte. In re Lee 200
Guest, Bedford College *v.* (C. A.) 278
Gunsbourg, In re (C. A.) 426

H.

Hartell *v.* Blackler 161
Harvey & Co. *v.* Herefordshire County Council 395
Herefordshire County Council, Harvey & Co. *v.* 395
Hoyle & Smith, Slater *v.* (C. A.) 11

I.

PAGE
Ind, Coope & Co. *v.* Rainham Chemical Works (C. A.) 487
Inglis, England *v.* 636
Inland Revenue Commissioners *v.* Blott (C. A.) 657
v. Greenwood (C. A.) 657
Port of London Authority *v.* (C. A.) 612
Robbins *v.* (C. A.) 677
v. von Glehn (C. A.) 553
Insurance (British and Foreign) Company, Wilson Shipping Company *v.* (C. A.) 25

J.

Jones, Thomas *v.* 399

K.

Kelly, Cole *v.* (C. A.) 106
Kotzias *v.* Tyser 69

L.

Ladies' Imperial Club, Young *v.* (C. A.) 523
Lamont, Attwood *v.* 146
Lebeaupin *v.* Crispin & Co. 714
Lee, In re. Ex parte Grunwaldt 200
Lloyds Bank, Baker *v.* 322

M.

McFarlane, Rex *v.* (C. C. A.) 183
McMaster, Eaglesham *v.* 169
Manchester (Bishop) Gore-Booth *v.* 412
Masonic Hall (Pontypridd) Co., Public Works Commissioners *v.* 233
Mayo, Dey *v.* (C. A.) 346
Mumford, Pennsylvania Co. *v.* (C. A.) 537

P.

PAGE

Paul, Rex *v.* (C. C. A.) 183
Payne & Co., Elliott Steam Tug Company *v.* 693
Pennsylvania Company *v.* Mumford (C. A.) 537
Pontypridd Masonic Hall Company, Public Works Commissioners *v.* 233
Port of London Authority *v.* Inland Revenue Commissioners (C. A.) 612
Public Works Commissioners *v.* Pontypridd Masonic Hall Company 233

R.

Rainham Chemical Works, Belvedere Fish Guano Company *v.* Ind, Coope & Co. *v.* Same (C. A.) 487
Ralli Brothers *v.* Compañia Naviera Sota y Aznar (C. A.) 287
Redmond *v.* Dainton 256
Rex, Anglo-Newfoundland Development Company *v.* (C. A.) 214
—— *v.* Bedfordshire County Council. Ex parte Sear 465
—— *v.* Cumberland Justices. Ex parte Attorney-General 630
—— *v.* Dymond (C. C. A.) 260
—— *v.* McFarlane (C. C. A.) 183
—— *v.* Paul (C. C. A.) 183
—— *v.* Stanley (C. C. A.) 235
—— *v.* Suter. Ex parte Attorney-General 630
—— *v.* Wood (C. C. A.) 179
—— *v.* Wormwood Scrubbs Prison (Governor) 305
Ritter *v.* Godfrey (C. A.) 47
Robbins *v.* Inland Revenue Commissioners (C. A.) 677
Rothschild *v.* Fisher (C. A.) 243

S.

Sear, Ex parte. Rex *v.* Bedfordshire County Council 465
Sedgwick *v.* Bourne 267
Shipping (Wilson) Company *v.* British and Foreign Insurance Company (C. A.) 25
Simon, Smits & Co., Di Ferdinando *v.* 704
Slater *v.* Hoyle & Smith (C. A.) 11
South Eastern and Chatham Railway Companies, Barwick *v.* 387
South Eastern and Chatham Railway Company, Gould *v.* 186
Southwick, Stanton *v.* 642
Stanley, Rex *v.* (C. C. A.) 235
Stanton *v.* Southwick 642
Steam Tug (Elliott) Company *v.* Payne & Co. 693
Sun Insurance Office and Calf, In re (C. A.) 366
Suter, Rex *v.* Ex parte Attorney-General 630

T.

Tendring Union *v.* Braintree Union 647
Thomas *v.* Jones 399
Thompson, Burchell *v.* (C. A.) 80
Tyser, Kotzias *v.* 69

V.

van den Hurk, Barry *v.* 709
von Glehn, Inland Revenue Commissioners *v.* (C. A.) 553

W.

Watkins *v.* Eden. In re Eden (C. A.) 333
Webster, Bradford Corporation *v.* 135
Wilson, Holgate & Co. *v.* Belgian Grain and Produce Company 1
——— Shipping Company *v.* British and Foreign Insurance Company (C. A.) 25
Wood, Rex *v.* (C. C. A.) 179
Wormwood Scrubbs Prison (Governor), Rex *v.* 305

Y.

Young *v.* Ladies' Imperial Club (C. A.) 523

TABLE OF CASES CITED.

A.

		PAGE
Aberdeen Commercial Company *v.* Great North of Scotland Railway Company	3 Ry. & Can. Traff. Cas. 205	581
Avery *v.* Williams	1 Vern. 27	430
Acteon, The	2 Dods. 48	497
Adair *v.* Young	12 Ch. D. 13	496
Admiralty Commissioners *v.* S.S. Amerika	[1917] A. C. 38	142
Akrokerri (Atlantic) Mines *v.* Economic Bank	[1904] 2 K. B. 465	349
Aldridge *v.* Great Western Railway Company	15 C. B. (N. S.) 582	187
Allix, In re	[1914] 2 K. B. 77	208
Alsager *v.* Currie	12 M. & W. 751	322
Anderson *v.* Maltby	2 Ves. Jun. 244	456
Appleby *v.* Myers	L. R. 2 C. P. 651	717
Ashton Gas Company *v.* Attorney-General	[1906] A. C. 10	659
Atkinson *v.* Ritchie	10 East, 530	300
Attorney-General *v.* Bradlaugh	14 Q. B. D. 667	557
——— *v.* Gas Light and Coke Company	7 Ch. D. 217	497
——— *v.* Great Eastern Railway Company	11 Ch. D. 449	479
——— *v.* Radloff	10 Ex. 84	557
Axford *v.* Reid	22 Q. B. D. 548	248

B.

Baines *v.* Geary	35 Ch. D. 154	149
Baker *v.* Adam	15 Com. Cas. 227	324
——— *v.* Yorkshire Fire and Life Assurance Company	[1892] 1 Q. B. 144	223
Baldock *v.* Westminster City Council	[1918] W. N. 339; 17 L. G. R. 190	195
Banbury *v.* Bank of Montreal	[1918] A. C. 626	349
Barbour *v.* South Eastern Railway Company	34 L. T. 67	188
Barker *v.* Hodgson	3 M. & S. 267	291
——— *v.* Janson	L. R. 3 C. P. 303	42
Barnacle *v.* Clark	[1900] 1 Q. B. 279	639
Barraclough *v.* Brown	[1897] A. C. 615	389
Barry *v.* Van den Hurk	[1920] 2 K. B. 709	722
Bateman *v.* Hunt	[1904] 2 K. B. 530	91
Baynes *v.* Lloyd	[1895] 1 Q. B. 820	123
Benzon, In re	[1914] 2 Ch. 68	209
Beta, The	L. R. 2 P. C. 447	420
Betts *v.* De Vitre	L. R. 3 Ch. 429, 441; L. R. 6 H. L. 319	496, 498

		PAGE
Bickerton *v.* Walker	31 Ch. D. 151	91
Birmingham Corporation *v.* Midland Railway Company	14 Ry. & Can. Traff. Cas. 24	579
Birmingham Excelsior Money Society *v.* Lane	[1904] 1 K. B. 35	248
Blackburn Bobbin Company *v.* Allen & Sons	[1918] 1 K. B. 540	300
Blackpool Pier Company *v.* Fylde Union	46 L. J. (M. C.) 189	392
Blane *v.* Francis	[1917] 1 K. B. 252	114
Blankenstein *v.* Robertson	24 Q. B. D. 543	92
Blight *v.* Page	3 Bos. & P. 295n.	301
Blott's Case	[1920] 1 K. B. 116	659
Blower *v.* Great Western Railway Company	L. R. 7 C. P. 655	191
Bostock *v.* Ramsey Urban Council	[1900] 2 Q. B. 616	50
Bouch *v.* Sproule	12 App. Cas. 385	657
Bower *v.* Foreign and Colonial Gas Company	22 W. R. 740	324
Bowes, In re	33 Ch. D. 586	325
——— *v.* Shand	2 App. Cas. 455	331
Braemount Steamship Company *v.* Andrew Weir & Co.	15 Com. Cas. 101	303
Brall, In re	[1893] 2 Q. B. 381	429
Brandao *v.* Barnett	1 Man. & G. 908; 12 Cl. & F. 787	325
Bridgewater Navigation Company, In re	[1891] 2 Ch. 317	660
Brinsmead *v.* Harrison	L. R. 6 C. P. 584; L. R. 7 C. P. 547	426, 433
British Columbia Sawmill Company *v.* Nettleship	L. R. 3 C. P. 499	24
British Waggon Company *v.* Lea	5 Q. B. D. 149	512
Bromley *v.* Smith	[1909] 2 K. B. 235	149
Brooke *v.* Inland Revenue Commissioners	[1918] 1 K. B. 257	659
Brooks *v.* Inland Revenue Commissioners	[1914] 1 K. B. 579; [1915] A. C. 478	658
Browne *v.* Furtado	[1903] 1 K. B. 273	283
Brys & Gilson *v.* Imperial Steamship Company	34 Times L. R. 300	50
Buckland *v.* Johnson	15 C. B. 145	433
Burges *v.* Wickham	3 B. & S. 669	123
Burt & Co. *v.* Inland Revenue Commissioners	[1919] 2 K. B. 650	617, 678

C.

Californian Copper Syndicate *v.* Harris	5 Tax Cas. 159	658
Campbell *v.* Wenlock (Lord)	4 F. & F. 716	643
Canadian Pacific Railway Company *v.* Roy	[1902] A. C. 220	497
Capital and Counties Bank *v.* Gordon	[1903] A. C. 240	348
Carstairs *v.* Taylor	L. R. 6 Ex. 217	643
Carter and Kenderdine's Contract, In re	[1897] 1 Ch. 776	434
Cash *v.* Kennion	11 Ves. 314	705, 724
Castellain *v.* Preston	11 Q. B. D. 380	42

		PAGE
Castle *v.* Playford	L. R. 7 Ex. 98	288
Central Control Board (Liquor Traffic) *v.* Cannon Brewery Company	[1919] A. C. 744	470
Charing Cross Electricity Supply Company *v.* Hydraulic Power Company	[1914] 3 K. B. 772	500
Chatenay *v.* Brazilian Submarine Telegraph Company	[1891] 1 Q. B. 79	295
Chesman *v.* Nainby	2 Ld. Raym. 1456; 1 Bro. P. C. 234	149
Chubb *v.* Stretch	L. R. 9 Eq. 555	249
Civil Service Co-operative Society *v.* General Steam Navigation Company	[1903] 2 K. B. 756	49
Clark *v.* Glasgow Assurance Company	1 Macq. 668	257
Clarke *v.* Watson	18 C. B. (N. S.) 278	170
Cole *v.* Manning	2 Q. B. D. 611	409
Collett *v.* De Gals	Cas. t. Talb. 65	430
Collette *v.* Lockie, Pemberton & Co.	[1918] W. N. 262	679
Collins *v.* Jones	10 B. & C. 777	322
Coltness Iron Company *v.* Black	1 Tax Cas. 287; 6 App. Cas. 315	561
Concadoro, The	[1916] 2 A. C. 199	720
Copland *v.* Stein	8 T. R. 199	430
Cowan & Sons *v.* North British Railway Company	11 Ry. & Can. Traff. Cas. 271	581
Croft *v.* Lumley	5 E. & B. 648; 6 H. L. C. 672	163
Crompton & Co. *v.* Lancashire and Yorkshire Railway Company	11 Ry. & Can. Traff. Cas. 285	610
Crowder *v.* Tinkler	19 Ves. 617	498
Cunningham *v.* Dunn	3 C. P. D. 443	287

D.

		PAGE
Darlow *v.* Shuttleworth	[1902] 1 K. B. 721	557
Davenport *v.* The Queen	3 App. Cas. 115	164
David and Adlard, In re	[1914] 2 K. B. 694	453
Davies *v.* Edwards	7 Ex. 22	209
——— *v.* Jenkins	[1900] 1 Q. B. 133; 81 L. T. 788	84, 88
—— Turner & Co. *v.* Lowen	64 L. T. 655	149
Davis *v.* Bowsher	5 T. R. 488	325
—— *v.* Garrett	6 Bing. 716	693
—— *v.* Witney Urban Council	63 J. P. 279	474
Dawson *v.* M'Kenzie	45 S. L. R. 473	403
Day *v.* McLea	22 Q. B. D. 610	166
Debtor, In re A	[1913] 3 K. B. 11	248
De Keyser's Royal Hotel	[1919] 2 Ch. 197	496
Delage *v.* Nugget Polish Company	92 L. T. 683	619
Delegal *v.* Naylor	7 Bing. 460; 5 M. & P. 443	705
Dendy *v.* Nicholl	4 C. B. (N. S.) 376	319
Dewes *v.* Fitch	[1920] W. N. 23	153
Di Ferdinando *v.* Simon	[1920] 2 K. B. 704	710, 722
Dixon *v.* Farrer	18 Q. B. D. 43	235
Dixon & Sons *v.* Henderson, Craig & Co.	[1919] 2 K. B. 778	720
Doe *v.* Batten	1 Cowp. 243	162
Dora Forster, The	[1900] P. 241	30
Dougal *v.* McCarthy	[1893] 1 Q. B. 736	123
Dovey *v.* Cory	[1901] A. C. 477	496

		PAGE
Drake, Ex parte	5 Ch. D. 866	433
Dubowski & Sons *v.* Goldstein	[1896] 1 Q. B. 478	149
Dumpor's Case	4 Rep. 119b; 1 Sm. L. C. 12th Ed. 43	167
Dunster *v.* Hollis	[1918] 2 K. B. 795	644
Dyer *v.* Munday	[1895] 1 Q. B. 742	558

E.

Eaglesfield *v.* Londonderry (Marquis of)	4 Ch. D. 693	498
Eastes *v.* Russ	[1914] 1 Ch. 468	152
Edmund *v.* Martell	24 Times L. R. 25	49
Edmundson *v.* Render	[1905] 2 Ch. 320	153
Edwards *v.* Marston	[1891] 1 Q. B. 225	94
Elderslie Steamship Company *v.* Borthwick	[1905] A. C. 93	718
Elliott Steam Tug Company *v.* Duncan & Sons	34 Times L. R. 583	697
Ellis *v.* Sheffield Gas Company	2 E. & B. 767	520
—— *v.* Torrington	[1920] 1 K. B. 399	132
Elve *v.* Boyton	[1891] 1 Ch. 501	470
Emden *v.* Carte	19 Ch. D. 311	339
Ertel Bieber & Co. *v.* Rio Tinto Company	[1918] A. C. 260	288
Evans, In re	[1913] 1 Ch. 23	663
Exeter (Bishop) *v.* Marshall	L. R. 3 H. L. 17	416

F.

Faith *v.* Pearson	6 Taunt. 439	497
Feather *v.* The Queen	6 B. & S. 257	497
Fletcher *v.* Rylands	L. R. 1 Ex. 265; 3 H. L. 330	496
Ford *v.* Cotesworth	L. R. 4 Q. B. 127; L. R. 5 Q. B. 544	287, 302
Forster *v.* Baker	[1910] 2 K. B. 636	244
Fulham Parish *v.* Woolwich Union	[1907] A. C. 255	651

G.

Gaden *v.* Newfoundland Savings Bank	[1899] A. C. 281	350
Gas Light and Coke Company *v.* St. Mary Abbotts Vestry	15 Q. B. D. 1	497
Geddis *v.* Bann Reservoir Proprietors	3 App. Cas. 430	199
George and Goldsmiths' Insurance Association, In re	[1899] 1 Q. B. 595	367
Giles *v.* Perkins	9 East, 12	350
Glasgow Water Commissioners *v.* Solicitor of Inland Revenue	2 R. 708; 1 Tax Cas. 29	615
Goldburg, In re	[1912] 1 K. B. 384	433
Golding *v.* Bradlaw	[1919] 2 K. B. 238	347
Goldsoll *v.* Goldman	[1914] 2 Ch. 603; [1915] 1 Ch. 292	151
Goodright *v.* Cordwent	6 T. R. 219	162
Gould, In re	19 Q. B. D. 92	208
Graham *v.* Lewis	22 Q. B. D. 1	679
——— *v.* Public Works Commissioners	[1901] 2 K. B. 781	234

		PAGE
Granville *v.* Firth	72 L. J. (K. B.) 152	49
Gravely *v.* Barnard	L. R. 18 Eq. 518	153
Great Western and Metropolitan Dairies *v.* Gibbs	34 Times L. R. 344	152
Great Western Railway Company *v.* Redmayne	L. R. 1 C. P. 329	15
Greaves *v.* Tofield	14 Ch. D. 563	582
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	572
Grimes *v.* Lethem	3 Tax Cas. 622	618
Grimwood *v.* Moss	L. R. 7 C. P. 360	319
Grinnell *v.* Wells	7 Man. & G. 1033	139
Guaranty Trust Company *v.* Hannay	[1915] 2 K. B. 536	390
Gunsbourg, In re	(1918-19) B. & C. R. 108; 88 L. J. (K. B.) 562	427

H.

Hahn *v.* Corbett	2 Bing. 205	44
Halifax Joint Stock Banking Company *v.* Gledhill	[1891] 1 Ch. 31	433
Hall *v.* Hollander	4 B. & C. 660	139
—— *v.* London, Brighton and South Coast Railway Company	15 Q. B. D. 505	574
Hamlyn *v.* Wood	[1891] 2 Q. B. 488	128
Hardy *v.* Fothergill	13 App. Cas. 351	325
Harland *v.* Binks	15 Q. B. 713	207
Harnett *v.* Vise	5 Ex. D. 307	50
Harris *v.* Austen	1 Rolle's Rep. 210	414
Harrison *v.* The Queen	10 Moo. P. C. 204	497
Hart, In re	[1912] 3 K. B. 6	429
—— *v.* Baxendale	16 L. T. 390	187
Hastings *v.* Whitley	2 Ex. 611	153
Haynes *v.* Doman	[1899] 2 Ch. 13	153
Hebbert *v.* Purchas	L. R. 3 P. C. 605	416
Hepburn *v.* Lordan	2 H. & M. 345	498
Herbert, Ex parte	13 Ves. 183	434
Herbert Morris, Ld. *v.* Saxelby	[1916] 1 A. C. 688	150
Hewer, In re	21 Ch. D. 871	92
Heywood *v.* Manchester (Bishop)	12 Q. B. D. 404	415
Hick *v.* Raymond	[1893] A. C. 22	302
Hickman *v.* Kent or Romney Marsh Sheep Breeders' Association	[1915] 1 Ch. 881	223
Hickman & Co. *v.* Roberts	[1913] A. C. 229	173
Hicks *v.* Faulkner	8 Q. B. D. 167	262
Higgins *v.* Higgins	[1916] 1 K. B. 640	49
Highworth and Swindon Union *v.* Westbury-on-Severn Union	14 App. Cas. 484	656
Hildesheim, In re	[1914] 3 K. B. 841	338
Hill, In re	33 Ch. D. 266	341
Hirth, In re	[1899] 1 Q. B. 612	433
Hitchcock *v.* Coker	6 Ad. & E. 438	152
Hodsoll *v.* Stallebrass	11 Ad. & E. 301	140
Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation, In re	2 Hudson's Building Contracts, 100	174
Holden, In re	20 Q. B. D. 43	445

		PAGE
Hole *v.* Sittingbourne and Sheerness Railway Company	6 H. & N. 488	504
Hood and Moore's Stores *v.* Jones	81 L. T. 169	153
Hood Barrs *v.* Heriot	[1896] A. C. 174	247
Horn *v.* Beard	[1912] 3 K. B. 181	115
Horne *v.* Midland Railway Company	L. R. 8 C. P. 131	20
Howard *v.* Woodward	34 L. J. (Ch.) 47	153
Howe *v.* Inland Revenue Commissioners	[1919] 2 K. B. 336	658
Howell *v.* Coupland	L. R. 9 Q. B. 462; 1 Q. B. D. 258	714
Hulthen *v.* Stewart & Co.	[1903] A. C. 389	302
Huxley *v.* West London Extension Railway Company	14 App. Cas. 26	50

I.

Inland Revenue Commissioners *v.* Auld, Pemberton & Co.	[1919] 2 I. R. 66	618
——— *v.* Maxse	[1919] 1 K. B. 647	680
——— *v.* Warnes & Co.	[1919] 2 K. B. 444	554
Institute of Patent Agents *v.* Lockwood	[1894] A. C. 347	389
Ionides *v.* Universal Marine Insurance Co.	14 C. B. (N. S.) 259	44
Ireland *v.* Livingston	L. R. 5 H. L. 395	6, 190
Ives *v.* Willans	[1894] 2 Ch. 478	219

J.

Jackson *v.* Smith	53 L. J. (Ch.) 972	339
Jacobs *v.* Crédit Lyonnais	12 Q. B. D. 589	287
Jacoby *v.* Whitmore	49 L. T. 335	153
Jamal *v.* Moolla Dawood	[1916] 1 A. C. 175	723
Jay *v.* Robinson	25 Q. B. D. 467	247
Jeffryes *v.* Agra and Masterman's Bank	L. R. 2 Eq. 674	324
Johnson *v.* St. Peter, Hereford	4 Ad. & E. 520	115
Johnston *v.* Chestergate Hat Manufacturing Company	[1915] 2 Ch. 338	660
Jones *v.* Carter	15 M. & W. 718	318
——— *v.* Joseph	[1918] W. N. 52; 87 L. J. (K. B.) 510	643
——— *v.* Peppercorne	John. 430	325
Jukes, In re	[1902] 2 K. B. 58	433

K.

Kaye *v.* Croydon Tramways Company	[1898] 1 Ch. 358	525
Kemp *v.* Wickes	3 Phillim. 264	271
Kensit *v.* St. Ethelburga (Rector)	[1900] P. 80	422
Kent County Council *v.* Folkestone Corporation	[1905] 1 K. B. 562	497
King *v.* Gillard	[1905] 2 Ch. 7	49
Kirsch *v.* Allen, Harding & Co.	[1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63, 174; [1920] W. N. 73	706, 710, 715
Knight *v.* Faith	15 Q. B. 649	28
Knott, In re	7 Ch. D. 549n	208

L.

		PAGE
Labouchere *v.* Wharncliffe (Earl)	13 Ch. D. 346	524
Lamley *v.* East Retford Corporation	55 J. P. 133	195
La Société Panhard et Levassor *v.* Panhard Levassor Motor Company	[1901] 2 Ch. 513	498
Latouche *v.* Dunsany (Lord)	1 Sch. & Lef. 137	430
Laughton *v.* Port Erin Commissioners	[1910] A. C. 565	638
Le Caux *v.* Eden	2 Doug. 594	497
Le Feuvre *v.* Lankester	3 E. & B. 530	638
Leng & Co. *v.* Andrews	[1909] 1 Ch. 763	153
Lewin *v.* Trimming	21 Q. B. D. 230	50
Lidgett *v.* Secretan	L. R. 6 C. P. 616	27
Lilley *v.* Doubleday	7 Q. B. D. 510	698
Liverpool and London and Globe Insurance Co. *v.* Bennett	6 Tax Cas. 327	660
Livie *v.* Janson	12 East, 648	26
Lloyd Bros. *v.* Milward	2 Hudson's Building Contracts, 262	170
Lobitos Oilfields *v.* Admiralty Commissioners	33 Times L. R. 472	219
London and Provincial Bank *v.* Bogle	7 Ch. D. 773	247
London, Brighton and South Coast Railway Company *v.* Truman	11 App. Cas. 45	497
Lyddon *v.* Thomas	17 Times L. R. 450	153
Lynn *v.* Bell	Ir. R. 10 C. L. 487	347

M.

		PAGE
McClelland *v.* Manchester Corporation	[1912] 1 K. B. 118	195
Mackonochie *v.* Penzance (Lord)	6 App. Cas. 424	271
McLean *v.* Clydesdale Banking Company	9 App. Cas. 95	350
M'Whirter *v.* Lynch	46 S. L. R. 83	403
Madras Railway Company *v.* Zemindar of Carvatenagarum	L. R. 1 Ind. App. 364	497
Madrazo *v.* Willes	3 B. & Al. 353	497
Mallan *v.* May	11 M. & W. 653	149
Manbre Saccharine Company *v.* Corn Products Company	[1919] 1 K. B. 198	5
Manchester Brewery *v.* Coombs	[1917] 1 K. B. 252	116
Manchester, Sheffield and Lincolnshire Railway Company *v.* Pidcock & Co.	10 Ry. & Can. Traff. Cas.	150, 575
Manners *v.* Pearson	[1898] 1 Ch. 581	710, 724
Marburg *v.* Marburg	26 Maryland, 8	705, 710, 723
Marston *v.* Phillips	9 L. T. 289	433
Martin *v.* Mackonochie	L. R. 2 A. & E. 116	416
Martinez *v.* Gerber	3 Man. & G. 88	140
Mason *v.* Provident Clothing and Supply Company	[1913] A. C. 724	147
Matsoukis *v.* Priestman	[1915] 1 K. B. 681	719
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt	[1893] 1 Ch. 630	149
May *v.* O'Neill	44 L. J. (Ch.) 660	153
Mentor, The	1 C. Rob. 179	497
Mersey Docks and Harbour Board *v.* Lucas	8 App. Cas. 891	612
Meter Cabs, In re	[1911] 2 Ch. 557	341

		PAGE
Metropolitan Railway Company *v.* Woodhouse	34 L. J. (Ch.) 297	476
Metropolitan Water Board *v.* Dick, Kerr & Co.	[1918] A. C. 119	296
Michael *v.* Alestree	2 Lev. 172	498
Mills *v.* Dunham	[1891] 1 Ch. 576	149
Misa *v.* Currie	1 App. Cas. 554	325
Morgan *v.* Harrison	[1907] 2 Ch. 137	117
Morgan's Patent Anchor Company *v.* Morgan	35 L. T. 811	100
Morrison & Co. *v.* Shaw, Savill and Albion Company	[1916] 2 K. B. 783	698
Mumford *v*, Getting	7 C. B. (N. S.) 305	152
Musgrove *v.* Pandelis	[1919] 2 K. B. 43	498
Myers *v.* Elliott	16 Q. B. D. 526	92

N.

Nelson Line *v.* James Nelson & Sons	[1908] A. C. 16	718
Nevanas & Co. *v.* Walker	[1914] 1 Ch. 413	150
New Zealand Shipping Company *v.* Société des Ateliers	[1919] A. C. 1	721
Nicholls *v.* Evans	[1914] 1 K. B. 118	347
——— *v.* Stretton	10 Q. B. 346	149
Nicholson *v.* Mounsey	15 East, 384	497
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Company	[1894] A. C. 535	149
North *v.* Stewart	15 App. Cas. 452	338
North Eastern Railway Company *v.* North British Railway Company	10 Ry. & Can. Traff. Cas. 82	603
North Staffordshire Railway Company *v.* Salt Union	10 Ry. & Can. Traff. Cas.	161, 575
Northern Navigation Company *v.* Inland Revenue Commissioners	56 S. L. R. 171	617
Norton *v.* Taylor	[1906] A. C. 378	638
Nunes *v.* Carter	L. R. 1 P. C. 342	430
Nutton *v.* Wilson	22 Q. B. D. 744	638

O.

Ogilvie, In re	[1919] W. N. 32	660
Oxford (Bishop) *v.* Henly	[1907] P. 88	416

P.

Paddington Burial Board *v.* Inland Revenue Commissioners	13 Q. B. D. 9	615
Palmer *v.* Mallet	36 Ch. D. 411	153
Paradine *v.* Jane	Aleyn, 26	256, 291
Park, In re	41 Ch. D. 326	339
Parker *v.* Jones	[1910] 2 K. B. 32	496
Parsons, Ex parte	16 Q. B. D. 532	94
——— *v.* Brand	25 Q. B. D. 110	95
——— *v.* Cotterill	56 L. T. 839	153
Partridge *v.* Mallandaine	18 Q. B. D. 276	556
Patent Castings Syndicate *v.* Etherington	[1919] 1 Ch. 306; 2 Ch. 254	679
Pennant's Case	3 Rep. 64a	166

		PAGE
Penny *v.* Wimbledon Urban Council	[1899] 2 Q. B. 72	504
Perkins *v.* Smith	1 Wils. (K. B.) 328	498
Phillips, Ex parte. Rex *v.* Williams	[1914] 1 K. B. 608	468
Pickard *v.* Smith	10 C. B. (N. S.) 470	504
Pickering *v.* Ilfracombe Railway Company	L. R. C. P. 235	149
Pitman *v.* Universal Marine Insurance Company	9 Q. B. D. 192	29
Pollitt, In re	[1893] 1 Q. B. 455	436
Ponsford, Baker & Co. *v.* Union of London and Smith's Bank	[1906] 2 Ch. 444	325
Portuguese Consolidated Copper Mines Company, In re	42 Ch. D. 160	524
Price *v.* Green	16 M. & W. 346	146
—— *v.* Union Lighterage Company	[1904] 1 K. B. 412	718
Printing and Numerical Registering Company *v.* Sampson	L. R. 19 Eq. 462	158

R.

Radcliffe & Co. *v.* Inland Revenue Commissioners	89 L. J. (K. B.) 267	617, 678
Read *v.* Brown	22 Q. B. D. 128	324
—— *v.* Lincoln (Bishop)	[1892] A. C. 644	423
Reffell *v.* Morton	70 J. P. 347	402
Reg. *v.* Bailey	12 Cox C. C. 56	679
—— *v.* Chalmers	10 Cox C. C. 450	262
—— *v.* Cracknell	10 Cox C. C. 408	262
—— *v.* Hamilton	1 C. & K. 212	262
—— *v.* Lister	Dears. & B. C. C. 209	498
—— *v.* ——	26 L. J. (M. C.) 196	518
—— *v.* Miard	1 Cox C. C. 22	260
—— *v.* Negus	L. R. 2 C. C. 34	679
—— *v.* Richards	11 Cox C. C. 43	263
—— *v.* Rogan	1 Cox C. C. 291	181
—— *v.* Surrey Justices	L. R. 5 Q. B. 466	471
Reigate Union *v.* Croydon Union	14 App. Cas. 465	648
Renner *v.* Tolley	68 L. T. 815	92
Rex *v.* Baskerville	[1916] 2 K. B. 658	405
—— *v.* Collins	Unreported	240
—— *v.* Craig	29 Vict. L. R. 28	266
—— *v.* Davis	[1917] 2 K. B. 855	238
—— *v.* Hadwen	[1902] 1 K. B. 882	184
—— *v.* Halliday	[1917] A. C. 260	307
—— *v.* Hausmann	3 Cr. App. R. 3; [1909] W. N. 198	561
—— *v.* Inland Revenue Commissioners	[1918] 1 K. B. 143	612
—— *v.* McDonell	73 J. P. 490	184
—— *v.* Pedly	1 Ad. & E. 822	498
—— *v.* Williams. Ex parte Phillips	[1914] 1 K. B. 608	468
Rhymney Iron Company *v.* Fowler	[1896] 2 Q. B. 79	560
Rich *v.* Basterfield	4 C. B. 783	498
Richards *v.* Gellatly	L. R. 7 C. P. 127	408
Richardson *v.* North Eastern Railway Company	L. R. 7 C. P. 75	189
Richardson-Gardner *v.* Fremantle	24 L. T. 81	525
Richdale, Ex parte	19 Ch. D. 409	350
Rickards *v.* Lothian	[1913] A. C. 263	497

		PAGE
Ridsdale *v.* Clifton	2 P. D. 276	421
Right *v.* Darby	1 T. R. 159	123
Ringer, Ex parte	73 J. P. 436	470
Robins *v.* Goddard	[1905] 1 K. B. 294	170
Robinson, In re	[1911] 1 Ch. 230	434
——— *v.* Bland	2 Burr. 1077	288
Robinson & Co. *v.* Heuer	[1898] 2 Ch. 451	149
Rodocanachi *v.* Milburn	18 Q. B. D. 67	11, 723
Roe *v.* Mutual Loan Fund	19 Q. B. D. 347	201
Rogers *v.* Maddocks	[1892] 3 Ch. 346	149
——— *v.* Rajendro Dutt	13 Moo. P. C. 209	497
Rogerson *v.* Ladbroke	1 Bing. 93	324
Roper *v.* Public Works Commissioners	[1915] 1 K. B. 45	234
Roswell *v.* Prior	12 Mod. 635	498
Rouquette *v.* Overmann	L. R. 10 Q. B. 525	288
Roxburghe *v.* Cox	17 Ch. D. 520	325
Rud *v.* Lincoln (Bishop)	Hutton, 66	414
Runtz *v.* Longbourne	8 Times L. R. 568	201
Rylands *v.* Fletcher	L. R. 3 H. L. 330	488

S.

Sadd *v.* Griffin	[1908] 2 K. B. 510	333
Sainter *v.* Ferguson	7 C. B. 716	153
Salford Corporation *v.* Lever	[1891] 1 Q. B. 168	25
Salomon *v.* Salomon & Co.	[1897] A. C. 22	495
Samuel *v.* Inland Revenue Commissioners	[1918] 2 K. B. 553	660
Sangster *v.* Kay	5 Ex. 386	679
Saumerez, In re	[1907] 2 K. B. 170	208
Scarf *v.* Jardine	7 App. Cas. 345	428
Scarth, In re	L. R. 10 Ch. 234	433
Schulte, Ex parte	L. R. 9 Ch. 409	434
Scott *v.* Bevan	2 B. & Ad. 78	705, 710
—— *v.* Ebury (Lord)	L. R. 2 C. P. 255	288
—— *v.* Liverpool Corporation	28 L. J. (Ch.) 230	173
—— *v.* Morley	20 Q. B. D. 120	245
Sharp *v.* McHenry	38 Ch. D. 427	89
Sharpe *v.* San Paulo Railway Company	L. R. 8 Ch. 597	173
Shaw *v.* Neale	6 H. L. C. 581	338
Shaw & Co. *v.* Symmons & Sons	[1917] 1 K. B. 799	698
Shawe *v.* Felton	2 East, 109	42
Shears *v.* Goddard	[1896] 1 Q. B. 406	431
Shepard *v.* De Bernales	13 East, 565	288
Shillito *v.* Theed	7 Bing. 405	359
Siggers *v.* Evans	24 L. J. (Q. B.) 305	207
Sjoerds *v.* Luscombe	16 East, 201	291
Slater *v.* Hoyle & Smith	[1920] 2 K. B. 11	723
Slobodinsky, In re	[1903] 2 K. B. 517	429
Smale's Case	Y. B. 17 Edw. 3, 59; pl. 59	414
Smith *v.* Anderson	15 Ch. D. 247	680
—— *v.* Baker	L. R. 8 C. P. 350	434
—— *v.* Brown	L. R. 6 Q. B. 729	420
—— *v.* Gronow	[1891] 2 Q. B. 394	319
—— *v.* Howden Union Rural Sanitary Authority	2 Hudson's Building Contracts, 156	173
—— *v.* Incorporated Council of Law Reporting for England and Wales	[1914] 3 K. B. 674	559

		PAGE
Smith *v.* Lion Brewery Company	[1911] A. C. 150	559
—— *v.* Marrable	11 M. & W. 5	643
Smyth *v.* Darley	2 H. L. C. 789	524
Sowerby *v.* Great Northern Railway Company	7 Ry. & Can. Traff. Cas. 156	575
Stanford, Ex parte	17 Q. B. D. 259	90
Stearn *v.* Prentice Bros.	[1919] 1 K. B. 394	643
Stephens *v.* Elwall	4 M. & S. 259	498
Stevenson *v.* Newnham	13 C. B. 285	434
Stewart *v.* Merchants' Marine Insurance Company	16 Q. B. D. 619	29
——— *v.* Steele	5 Sc. N. R. 927	29
Stone *v.* Cartwright	6 T. R. 411	496
Stone & Co. *v.* Midland Railway Company	[1903] 1 K. B. 741; [1904] 1 K. B. 669	582
Strong & Co. *v.* Woodifield	[1905] 2 K. B. 350; [1906] A. C. 448	559
Stuart *v.* Crawley	2 Stark. 323	187
Sumner *v.* Wix	L. R. 3 A. & E. 58	416
Sun Insurance Office *v.* Clark	[1912] A. C. 443	558
Sutcliffe *v.* Smith	2 Times L. R. 881	50
Swan Brewery Company *v.* The King	[1914] A. C. 231	657

T.

Tapley *v.* Martens	8 T. R. 451	288
Taylor *v.* Caldwell	3 B. & S. 826	717
—— *v.* Hollard	[1902] 1 K. B. 676	209
Taylor & Co., In re	[1891] 1 Ch. 590	338
Tenant *v.* Ellis	6 Q. B. D. 46	50
Tennant *v.* Smith	[1892] A. C. 150	658
Theodore *v.* Duncan	[1919] A. C. 696	308
Thomas, In re	[1916] 2 Ch. 331	660
——— *v.* Kelly	13 App. Cas. 506	86
Thompson *v.* Amis	[1917] 2 Ch. 211	679
——— *v.* Giles	2 B. & C. 422	350
Throckmerton *v.* Tracy	Plowd. 145	116
Tilling *v.* Dick, Kerr & Co.	[1905] 1 K. B. 562	497
Tobin *v.* The Queen	16 C. B. (N. S.) 310	497
Todd *v.* Robinson	14 Q. B. D. 739	639
Toleman *v.* Portbury	L. R. 6 Q. B. 245; L. R. 7 Q. B. 344	317, 318
Tolhurst *v.* Associated Portland Cement Manufacturers	[1903] A. C. 414	496
Topping, Ex parte	34 L. J. (Bk.) 44	209
Turner *v.* Walsh	[1909] 2 K. B. 484	123

U.

Underwood & Son *v.* Barker	[1899] 1 Ch. 300	149
Usher's Wiltshire Brewery *v.* Bruce	[1915] A. C. 433	557

V.

Vansittart, In re	[1893] 2 Q. B. 377	429
Vaughan *v.* Taff Vale Railway Company	5 H. & N. 679	496
Vernon *v.* Hanson	2 T. R. 287	434

		PAGE
Vickers, Sons & Maxim *v.* Midland Railway Company	11 Ry. & Can. Traff. Cas. 249	581
Villars, Ex parte	L. R. 9 Ch. 432	455
Volcano, The	2 Wm. Rob. 337	497

W.

Wakefield Light Railways Company *v.* Wakefield Corporation	[1907] 2 K. B. 256	470
Watson *v.* Mid-Wales Railway Company	L. R. 2 C. P. 593	324
Webb *v.* Clark	78 L. T. Newsp. 96	153
Wedd *v.* Porter	[1916] 2 K. B. 91	115
Weir & Co. *v.* Girvin & Co.	[1900] 1 Q. B. 45	288
Wertheim *v.* Chicoutimi Pulp Company	[1911] A. C. 301	11
West *v.* Bristol Tramways Company	[1908] 2 K. B. 14	498
West Derby Union *v.* Atcham Union	24 Q. B. D. 117	655
West Ham Union *v.* Holbeach Union	[1905] A. C. 453	654
Westerton *v.* Liddell	Moore's Special Report	424
Westminster School *v.* Reith	[1915] A. C. 259	281
Whiteley *v.* Edwards	[1896] 2 Q. B. 48	247
Wiedermann *v.* Walpole	[1891] 2 Q. B. 534	402
Wilcock *v.* Booth	[1920] W. N. 44	644
Wilkes *v.* Bodington	2 Vern. 599	430
Williams *v.* Agius	[1914] A. C. 510	11, 723
——— *v.* Burrell	1 C. B. 402	123
——— *v.* Golding	L. R. 1 C. P. 69	497
——— *v.* Reynolds	6 B. & S. 495	20
Williamson Film Printing Company *v.* Inland Revenue Commissioners	[1918] 2 K. B. 720	612
Wilson, In re	[1916] 1 K. B. 382	201
——— In re	[1916] 2 H. B. R. 70	201
Woking Urban Council (Basingstoke Canal) Act, 1911, In re	[1914] 1 Ch. 300	472
Wood *v.* Headingley-cum-Burley Burial Board	[1892] 1 Q. B. 713	273
Woodside *v.* Globe Marine Insurance Company	[1896] 1 Q. B. 105	30
Woolwich Union *v.* Fulham Union	[1906] 2 K. B. 240	654
Worcestershire County Council *v.* Notley	[1914] 3 K. B. 330	397

Y.

Young *v.* Bank of Bengal	1 Moo. P. C. 150	324
Yrazu *v.* Astral Shipping Company	9 Com. Cas. 100	720

Z.

Zinc Corporation *v.* Hirsch	[1916] 1 K. B. 541	719

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

WILSON, HOLGATE & COMPANY, LIMITED *v.* BELGIAN GRAIN AND PRODUCE COMPANY, LIMITED. (1)

1919
May 26, 27, 28.

[1919. W. 357.]

Sale of Goods—C.i.f. Contract—Payment against Shipping Documents—Tender of Documents—Policy of Insurance—Broker's Cover Note—Certificate of Insurance—Sufficiency of Tender—Alleged Custom.

Under a c.i.f. contract for the sale of goods, the seller, in the absence of any custom or special stipulation to the contrary, does not perform his obligation of tendering to the buyer along with the other shipping documents a policy of insurance by tendering instead of a proper policy a broker's cover note or a certificate of insurance.

Where the parties to a c.i.f. contract for the sale of goods, which have

(1) Publication of this case has been delayed by reason of an expected appeal which did not take place.

1919

WILSON, HOLGATE & COMPANY v. BELGIAN GRAIN AND PRODUCE COMPANY.

been duly shipped, enter into a stipulation that the seller, instead of tendering with the other shipping documents a policy of insurance, may tender a certificate of insurance with a broker's undertaking to hold the policy for the buyer's account, the seller does not perform his obligation under the stipulation by tendering a certificate of insurance without a broker's undertaking.

Observations on a broker's cover note and a certificate of insurance.

ACTION tried before Bailhache J. in the Commercial Court.

By a contract in writing dated October 24, 1918, the plaintiffs, Wilson, Holgate & Co., Ld., contracted to sell to the defendants, the Belgian Grain and Produce Co., Ld., 300 tons of Brazilian manioc starch at the price of 105*l.* per ton c.i.f. from Brazil to Havre. The sellers were to provide marine and war risk insurance free of particular average to the value of the invoice, any excess belonging to the sellers. The goods were to be shipped during November and December, 1918, and/or January, 1919. Payment was to be by net cash in London against shipping documents.

In December, 1918, the goods were shipped under the contract in Brazil on board the French steamship *Avare* for Havre. On January 18, 1919, the *Avare* arrived off Havre, but, as she could not then be discharged there, she was ordered to Cherbourg to await her turn at Havre. On February 3, 1919, the *Avare* arrived at Havre for the second time and got into a discharging berth there.

On February 6, 1919, the defendants wrote to the plaintiffs stating that the latter were in default and that unless proper documents were tendered by 2 P.M. on the following day they would treat the plaintiffs as having made final default.

On February 7, 1919, the plaintiffs made a tender to the defendants at the office of the latter in London of the bill of lading for the goods, an invoice, and a broker's cover note for 31,500*l.*, which tender was refused by the defendants; and on the same date the plaintiffs wrote acknowledging receipt of the defendants' letter and confirming the tender

of the documents. The broker's cover note, included among the documents, was as follows :—

"THOS. MATHESON & Co., 17, Gracechurch Street,
"Insurance Brokers. and at Lloyds,
London, 5th Feb., 1919.

"Messrs. WILSON, HOLGATE & Co., LTD.

"*Amended cancelling No.* 15097.

"In accordance with your instructions we have effected the following insurance.

"*Conditions.*

"Also against all risks excluded by the F.C. and S.R. and C.C. clauses.	31,500*l.* @ 10/- % Per *Avare* s. and/or strs h/c.
"Including all damage by mines and/or torpedoes.	At and from Brazil. To Havre.
"Excluding all claims due to delay and/or deterioration.	On 300 tons of Manioc starch Vd. 105*l.* per ton and 20%.
"Warranted free of any claim arising from capture, seizure, arrest, restraint or detainment except by the enemies of Great Britain or by the enemies of the country to which the assured or the ship belongs.	F.p.a. inst. clauses. Effected with Lloyd's Underwriters and companies as advised.
"Amount to be reduced by any amount short shipped or insurance to be cancelled should shipment not be made.	E. & O. E.
"Warehouse to warehouse.	
"Average irrespective of percentage.	

"(Signed)
"For THOS. MATHESON & Co.,
"R. J. SANDHAM.
"Endorsed for and on behalf of
"WILSON, HOLGATE & Co., LTD.
"E. C. SIBLEY, *Secretary.*"

On the same date (February 7) a conversation took place by telephone between the representative of the plaintiffs and the managing director of the defendants, when the latter took the objection that the documents were not in order as they did not include a policy of insurance, but only a broker's cover note. On the following day (February 8) the conversation was renewed by telephone. The defendants' managing director refused to take a broker's cover note instead of a policy of insurance, but stated that he would

1919

WILSON, HOLGATE & COMPANY v. BELGIAN GRAIN AND PRODUCE COMPANY.

not object to a certificate of insurance signed by a satisfactory broker with a broker's undertaking to hold the policy for defendants' account, provided the documents were in order in other respects and were tendered immediately. On February 10, 1919, the defendants wrote to the plaintiffs that as the latter were still in default with regard to a proper tender of documents they now treated them as having made final default. On the same date the plaintiffs wrote to the defendants: "Regarding insurance it was agreed that we should obtain from our brokers an underwriting to hold insurance policies at your disposal." On February 11, 1919, the defendants replied to the plaintiffs' last letter: "We told you that we required insurance policies, but that we would, if things in other respects were in order, not object to certificates of insurance signed by a satisfactory broker undertaking to hold the policies for our account."

On the same date (February 11) the plaintiffs made a retender of documents to the defendants. The documents included instead of a policy a certificate of insurance for 31,500*l.* which the plaintiffs had obtained from their brokers, but that certificate did not contain nor was there with it any undertaking by the broker to hand the policy of insurance when procured to the defendants. The defendants refused to take up the documents, or to accept delivery of or pay for the goods.

On March 4, 1919, the plaintiffs brought the present action against the defendants, claiming the price of the goods or alternatively damages for their detention.

The plaintiffs in their points of claim stated (para. 3) that on arrival of the goods the plaintiffs tendered to the defendants all necessary and proper shipping documents, and the defendants in breach of their contract refused to take up the documents or pay for the goods; (para. 4) that the market price of the goods at the date of the alleged breach of contract was lower by 45*l.* per ton than the contract price, and that the plaintiffs had suffered damage to the extent of that difference on 300 tons; and the plaintiffs claimed 13,500*l.* damages.

The defendants stated that they denied the allegations in the points of claim; that the plaintiffs did not tender documents within the time stipulated by the contract; that the documents tendered did not comprise any policy of insurance; and that the damages were denied.

The action was tried by Bailhache J. on May 26, 27 and 28, 1919.

On behalf of the plaintiffs witnesses were called who stated that under a c.i.f. contract it was now the common practice for the seller to tender to the buyer instead of a policy of insurance a broker's cover note or a certificate of insurance; but they did not state that the buyer was bound to accept either of these last-mentoned documents instead of a policy.

On behalf of the defendants witnesses stated that while occasionally as a matter of grace the buyer accepted a broker's cover note as a satisfactory insurance, yet, in the absence of some stipulation in the contract to the contrary, the buyer was always entitled to have the actual policies of insurance with the documents.

His Lordship allowed an amendment of the pleadings in order to admit of the question being raised whether under the special stipulation that had been made by the parties on February 8, 1919, the second tender of documents, including a certificate of insurance, was sufficient.

MacKinnon K.C. and *Pitman* for the plaintiffs. The tender of documents which the plaintiffs made to the defendants on February 7, 1919, was a valid tender notwithstanding that the documents included a broker's cover note instead of a policy of insurance. The evidence called on behalf of the plaintiffs proves that there is a custom according to which under a c.i.f. contract the seller may tender to the buyer instead of a policy of insurance a broker's cover note or a certificate of insurance. The case of *Manbre Saccharine Co.* v. *Corn Products Co.* (1) is distinguishable from this case inasmuch as in that case the sellers only tendered to the buyers a letter of their own offering to hold the buyers

(1) [1919] 1 K. B. 198.

1919

WILSON, HOLGATE & COMPANY v. BELGIAN GRAIN AND PRODUCE COMPANY.

covered in accordance with an alleged policy of insurance; whereas here the plaintiffs tendered to the defendants a cover note from the brokers who had actually effected the insurance and were procuring the policy.

The subsequent tender on February 11, 1919, of documents including a certificate of insurance was also valid. It is true that on February 8, 1919, it was stipulated that the plaintiffs should tender a certificate of insurance with a broker's undertaking. The tender of a certificate of insurance without a broker's undertaking was however a sufficient compliance with that stipulation.

Leck K.C. and *Claughton Scott* for the defendants. The first tender of documents which the plaintiffs made to the defendants was invalid inasmuch as the documents tendered included instead of a policy of insurance only a broker's cover note. It is a well-established proposition of law that, in the absence of any custom or special agreement to the contrary, the seller under a c.i.f. contract of sale is bound to tender along with the other shipping documents a proper policy of insurance: per Blackburn J. in *Ireland* v. *Livingston* (1); and *Manbre Saccharine Co.* v. *Corn Products Co.* (2) The evidence given in the present case does not prove a custom that the buyer of goods under a contract of that kind must accept a tender of a broker's cover note or a certificate of insurance instead of a proper policy of insurance; but merely that in certain cases the buyer has as a matter of favour consented to take one or other of these less formal documents.

The second tender of documents which was made by the plaintiffs after the special stipulation had been entered into was also invalid, because the documents tendered instead of comprising as the stipulation required a certificate of insurance with a broker's undertaking comprised a certificate of insurance only.

BAILHACHE J. In this case I am about to deliver a judgment which as a judge in the Commercial Court I am

(1) (1872) L. R. 5 H. L. 395, 406. (2) [1919] 1 K. B. 198.

reluctant to deliver, because it gives effect to an objection as to which commercial men in the City of London might well complain that it is a merely technical objection. To my mind, however, I am bound to give effect to the objection because I think it is sound in law. [His Lordship stated the facts of the case and continued :]

The only question I have to decide is whether or not there was an effective legal tender of the shipping documents by the plaintiffs which the defendants were bound to accept. It has been settled at any rate since Blackburn J. delivered his well-known judgment in *Ireland* v. *Livingston* (1) about forty-seven years ago, and it had apparently been settled even earlier, that under a c.i.f. contract for the sale of goods the documents which the seller is bound to tender to the buyer are a bill of lading, an invoice and a policy of insurance, and it is well understood that under a contract of that kind these are the documents which the seller is required to tender.

Counsel for the plaintiffs have called a number of witnesses of high standing in the City of London, to whose evidence I give absolute credence, all of whom have stated that it is the common practice nowadays for sellers to tender, instead of a policy of insurance, a broker's cover note or a certificate of insurance. A certificate of insurance is generally but not always used in a case where the goods which are the subject-matter of the sale are insured by an open or a floating policy, which covers other goods as well as the particular goods in question, and is for a larger amount than if it covered these goods only. One of the witnesses, Mr. Matheson, says that the certificate of insurance is also used to take the place of a broker's cover note. It must be borne in mind that, in dealing with certificates of insurance, I am not referring to American certificates of insurance which stand on a different footing and are equivalent to policies, being accepted in this country as policies. I am now dealing only with brokers' cover notes and certificates of insurance as issued by brokers in this country. The plaintiffs' witnesses have

(1) [1872] L. R. 5 H. L. 395, 406.

1919

WILSON, HOLGATE & COMPANY v. BELGIAN GRAIN AND PRODUCE COMPANY.

Bailhache J.

stated that these brokers' cover notes and certificates of insurance are constantly accepted by buyers in place of policies of insurance. I have no doubt that all that these witnesses say is true. The preparation of a policy of insurance takes some little time, particularly if there are a number of underwriters or several insurance companies, and when documents require to be tendered with promptness on the arrival of a steamer in order that expense may not be incurred through delay in unloading, or through the buyer not being ready to take delivery, it is not always practicable to obtain actual policies of insurance. In order to facilitate business in circumstances such as these, buyers are accordingly in the habit of accepting brokers' cover notes and certificates of insurance instead of insisting upon policies. These witnesses, however, could give no instance in which there has been any contest as to the validity of a tender of a cover note or certificate, still less did they give any instance in which, on a buyer's demand for and insistence upon a policy being resisted, he has given way. On the contrary, these witnesses were all very careful to explain that they were not prepared to say that the buyer was bound to take a cover note or certificate of insurance instead of a policy of insurance. All that they could say was that so far as they knew these cover notes and certificates were constantly taken and never refused. The true position appears to me to be this: The seller must be prepared to deliver and if required to do so must deliver a policy of insurance, but in order to facilitate business, particularly during the war when there was a shortage of clerks and a superabundance of business, commercial men have resorted to this practice of not insisting upon their strict right to a policy, and have been taking these cover notes and certificates of insurance.

I am not satisfied that since *Ireland* v. *Livingston* (1) was decided any custom has arisen which obviates the necessity for a tender by the seller of a policy of insurance if the buyer requires it. There are of course obvious

(1) L. R. 5 H. L. 395.

differences between the buyer's position under a policy of insurance and his position under a broker's cover note or a certificate of insurance. I will mention only one or two of these. On a policy of insurance which deals with the buyer's own contractual goods and with those of nobody else, the buyer has a direct right of action on the policy against the underwriters. On a broker's cover note he has apparently no right of action against anybody, even, I am inclined to think, where the cover note is indorsed. The broker I should suppose is liable to his own principal. Moreover a right of action against a broker even if it exists is a very different right from that of an action against underwriters. The same observation applies to a certificate of insurance. So far as the broker's cover note is concerned, and, possibly also, so far as a certificate of insurance is concerned, the buyer might also be faced with a further serious difficulty arising from the assertion by the broker of his general lien for his charges against the person who instructed him to take up the policies, and on whose behalf he issued his cover note or his certificate of insurance. These are some of the practical differences between a policy of insurance on the one hand and a cover note or a certificate of insurance on the other. In my judgment it has not been proved that under a c.i.f. contract the buyer is bound to take any other document than a policy of insurance. He has, as I understand it, a legal right to require a policy, and a policy which relates to the goods which are the subject-matter of his own contract of sale and to no other goods.

It is of course clear that the buyer, if he chooses to do so, may waive his right to require a policy of insurance, and may agree to take some other document. If he chooses to adopt that course, a document other than a policy can only be forced upon him if it is a document of the kind which he has agreed to take. He cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which

1919

WILSON, HOLGATE & COMPANY v. BELGIAN GRAIN AND PRODUCE COMPANY.

Bailhache J.

does not differ from it in any material respect. In this particular instance, I am satisfied that on February 8, 1919, the managing director of the defendants did agree on their behalf to take a certificate of insurance coupled with the broker's undertaking to hold the policy when issued for his account. What was tendered to him was a certificate of insurance without the broker's undertaking. He did not get that which he stipulated for and was prepared to take in lieu of a policy.

It seems to me, therefore, that the plaintiffs in this case did not comply either with their obligation to tender a policy, or with their substituted obligation to tender a certificate of insurance together with a broker's guarantee. That being so, I am bound to give effect to the defendants' objection, though I do so most unwillingly. I accordingly give judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs : *Kekewich, Smith & Kaye.*
Solicitors for defendants : *William A. Crump & Son.*

J. R.

[IN THE COURT OF APPEAL.]

C. A.
1919
Nov. 11,12;
Dec. 5.

SLATER AND ANOTHER *v.* HOYLE & SMITH, LIMITED.

[1919. S. 614.]

MANCHESTER DISTRICT REGISTRY.

Contract—Sale of Goods—Breach of Warranty of Quality—Measure of Damages—Market Value—Circumstances peculiar to Plaintiff—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 53, *sub-s.* 3.

Sect. 53 of the Sale of Goods Act, 1893, contains the following sub-sections:—

Sub-s. 2: "The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

Sub-s. 3: "In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Manufacturers agreed to sell 3000 pieces of unbleached cotton cloth of a specified quality at a certain price per piece to be delivered within a certain period. They delivered 1625 pieces of inferior quality. The purchasers accepted and paid for these pieces but refused to take any further deliveries, and, being sued by the manufacturers for non-acceptance of the remaining pieces, counterclaimed damages for breach of warranty of quality in relation to the 1625 pieces.

The purchasers had made a contract to deliver 2000 pieces of bleached cloth to third persons at a price per piece higher than the market price per piece of the 1625 pieces as delivered, and in fulfilment of that contract had actually delivered 691 of the 1625 pieces, and had received payment for them.

Held, that this contract was not to be taken into account in measuring the damages.

Rodocanachi v. *Milburn* (1886) 18 Q. B. D. 67 and *Williams* v. *Agius* [1914] A. C. 510 followed and applied.

Wertheim v. *Chicoutimi Pulp Co.* [1911] A. C. 301 distinguished and commented upon.

Judgment of Greer J. affirmed.

APPEAL from the judgment of Greer J. in an action tried at Manchester before the learned judge without a jury.

The plaintiffs were manufacturers of cotton cloth. On June 20, 1918, they agreed to sell to the defendants at 6*l.* 9*s.* per piece of 136 yards 3000 pieces of unbleached repp,

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

condenser weft, of a specified length, width, yarn, warp, and weft. Delivery was to commence in two months and to be completed in December, 1918, but this period was afterwards extended by the consent of both parties. Between August 22, 1918, and January 30, 1919, the plaintiffs had delivered and the defendants had accepted and paid for 1625 pieces.

The defendants alleged, as the fact was, that these pieces were not in accordance with the contract and were unmerchantable if offered for sale as described therein, and they refused to accept the remaining 1375 pieces on the footing that the plaintiffs by persistently delivering inferior cloth had repudiated their obligations under the contract.

The plaintiffs sued the defendants for not accepting the 1375 pieces. The defendants counterclaimed (1.) for breach of warranty of quality as to the 1625 pieces, and (2.) for breach of contract to deliver the 1375 pieces.

The learned judge held that the plaintiffs had repudiated their obligations under the contract and gave judgment for the defendants on the claim.

Upon the counterclaim, for non-delivery of the 1375 pieces he awarded the defendants nominal damages only, because at the time of delivery the market price had fallen below the contract price. As to the 1625 delivered by the plaintiffs, the defendants claimed the difference between the market value on the various days of delivery of 1625 pieces of the quality described in the contract and the market value of the pieces delivered as they were. This difference the learned judge found to be $4\frac{1}{2}d.$ a yard, that is the difference between 1*s.* a yard, the market value of the goods as described in the contract, and $7\frac{1}{2}d.$ a yard, the market value of the goods actually delivered. He gave judgment for the defendants, the buyers, upon this footing.

The sellers appealed. The evidence at the trial showed that the buyers, the respondents, had made two contracts to sell bleached cloth to the West Somerset and Devon Manufacturing Co., one dated December 14, 1917, for 2000 pieces at $8\frac{1}{2}d.$ a yard, and the other dated June 26, 1918,

for 3000 pieces at 1*s.* 3*d* a yard. They had completed deliveries under the earlier of these contracts by the end of January, 1919, and in fulfilment thereof they had in fact delivered 691 pieces of the cloth they had purchased from the appellants, and had received the full contract price of 8½*d.* a yard from the company. The appellants did not know that these contracts had been made or that their goods were to be delivered in fulfilment of either of them. They contended nevertheless that the learned judge ought to have taken them into account in mitigation of the damages claimed by the respondents. (1)

Cyril Atkinson K.C. and *T. B. Leigh* for the appellants.
Sylvain Mayer K.C. and *Eastham* for the respondents.

Cur. adv. vult.

December 5. Written judgments were delivered.

BANKES L.J. (2) This is the plaintiffs' appeal from a judgment of Greer J. The plaintiffs are manufacturers of cotton cloths. The action was brought to recover damages for a refusal to accept 1375 pieces of cotton cloth, the balance of a quantity of 3000 pieces which the defendants had agreed to purchase from the plaintiffs. The defendants justified the refusal upon the ground that the goods which the plaintiffs had delivered under the contract were unmerchantable; and they counterclaimed for damages in respect of these goods. The learned judge held that the defendants were in the right in refusing to accept any more goods under the contract, and he awarded them a considerable sum as damages in respect of the goods which had been delivered. From this decision the plaintiffs appeal and ask that judgment shall be entered in their favour or that a new trial shall be ordered, upon the ground that the learned judge

(1) Other points were raised in this appeal, but this point as to the measure of damages was the only matter of importance.

(2) The judgment of Bankes L.J. dealt at length with the whole case. Only that part thereof which relates to the measure of damages is here reported.

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

Bankes L.J.

put a wrong construction upon the contract, and applied a wrong test in considering whether the goods supplied by the plaintiffs under the contract were or were not in accordance with the contract; and, further, that the damages awarded by the learned judge were excessive.

The last point that was taken was the only one which appeared to present any difficulty. The contract between the appellants and the respondents is dated June 20, 1918, and was for 3000 pieces, delivery to commence in two months, and to be completed in December or earlier. The cotton was to be unbleached. The respondents had entered into two contracts with the West Somerset and Devon Manufacturing Co. for bleached cloth, one dated December 14, 1917, for 2000 pieces at $8\frac{1}{2}d.$ per yard, and the other dated June 26, 1918, for 3000 pieces at 1*s.* 3*d.* per yard. The respondents completed the deliveries under the earlier of the two contracts by the end of January, 1919. They in fact used 691 pieces of the appellants' cloth in fulfilment of that contract, and were paid the full contract price for it. Under these circumstances it was contended for the appellants that the respondents had suffered no loss and that they ought not to be awarded any damages in respect of these 691 pieces. It is not suggested that the appellants had any knowledge of the respondents' contract with the West Somerset and Devon Co.

We reserved judgment in order that we might consider the cases of *Rodocanachi* v. *Milburn* (1); *Wertheim* v. *Chicoutimi Pulp Co.* (2); and *Williams* v. *Agius* (3), to which attention was called by a member of the Court.

Rodocanachi's Case (1) has been expressly approved by the House of Lords in *Williams* v. *Agius*. (3) Lord Esher M.R. in *Rodocanachi's Case* (4) laid down the law as follows: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant,

(1) 18 Q. B. D. 67.
(2) [1911] A. C. 301.
(3) [1914] A. C. 510.
(4) 18 Q. B. D. 67, 77.

as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods."

The claim in *Wertheim's Case* (1) was for delay in delivering goods. Lord Dunedin in *Williams* v. *Agius* (2) approves the decision in *Wertheim's Case* (1), and distinguishes it from *Rodocanachi's Case* (3) upon the ground that in the one case the buyer got the goods and was only claiming damages for the delay in delivering them, whereas in the other case the buyer never got any goods at all. Lord Atkinson in *Williams* v. *Agius* (4) expressly says that *Rodocanachi's Case* (3) has "of course no reference whatever to cases of the late delivery of goods as distinguished from their non-delivery." Having regard to what appears to me to be the well-established rule as to damages as laid down in *Great Western Ry. Co.* v. *Redmayne* (5) and in *Rodocanachi's Case* (3) I do not think that the decision in *Wertheim's Case* (1) can be extended to apply to a case where damages are claimed for a breach of warranty of quality. It is not, however, necessary to decide that point, as in the present case what the appellants were buying from the respondents were unbleached goods, whereas what they were selling to the West Somerset and Devon Manufacturing Co. were bleached goods. If the rule laid down in *Wertheim's Case* (1) is ever to be applied in a case like the present, it can only be so applied where the sub-sale relied on in mitigation of damages is a sale of the identical article which was the subject of what Lord Dunedin speaks of in *Williams* v. *Agius* (2) as the principal sale. This is made clear by a passage in Lord Dunedin's speech in that case. (6)

For the above reasons I think that the appeal fails on all points and must be dismissed with costs.

WARRINGTON L.J. The plaintiffs are the sellers, and the defendants are the buyers under a contract dated June 20, 1918, for the sale and purchase of certain goods, to wit, 3000

(1) [1911] A. C. 301.
(2) [1914] A. C. 510, 522.
(3) 18 Q. B. D. 67.
(4) [1914] A. C. 510, 529.
(5) (1866) L. R. 1 C. P. 329.
(6) [1914] A, C. 510, 523.

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

Warrington L.J.

pieces of cotton cloth of a description mentioned in the contract. After 1625 pieces had been delivered the defendants refused to accept the remaining 1375, alleging that the cloth already delivered had been persistently of a quality not in accordance with the contract and that they were entitled to assume that future deliveries would be as bad, and to treat the plaintiffs as repudiating the contract. The plaintiffs sued the defendants for non-acceptance of the undelivered goods, and the defendants counterclaimed for damages, (1.), for the non-delivery of the undelivered goods; and (2.), for breach of warranty of quality in respect of the goods delivered.

The learned judge decided the main issue in the defendants' favour, and on the counterclaim he awarded no damages for non-delivery, on the ground that the market price at the date of the breach was below the contract price; but as damages for breach of warranty he awarded the difference between the value at the date of delivery of the goods actually delivered and the value they would have had if they had answered to the warranty, eliminating from consideration certain sub-contracts made by the defendants, which I will refer to more particularly in a moment, in partial fulfilment of which 691 pieces of the cloth delivered by the plaintiffs had been employed. On the main question I agree with the judgment of Greer J. and Bankes L.J., and have nothing to add. I also agree that taking, as he did, $4\frac{1}{2}d.$ a yard as the difference in the two values, the judge was doing the best he could on the materials before him, and we ought not to interfere.

But the plaintiffs say that as to the 691 pieces delivered under the sub-contracts, the learned judge ought to have taken into account the prices realized by the defendants under the sub-contracts, and that as those prices were equal to or exceeded the contract price, the defendants in fact suffered no damage and ought to have had none awarded to them. There were two sub-contracts, both with the West Somerset and Devon Manufacturing Co., one dated December 14, 1917, before the date of the contract in question, and the other dated June 26, 1918. The price under the

first was $8\frac{1}{2}d.$ a yard, and under the second 1*s.* 3*d.* The cloth to be delivered under the head contract was unbleached, or "grey" cloth, that under the sub-contracts was, as I understand, to be bleached. The plaintiffs knew nothing of these contracts, and the defendants were under no obligation to their purchasers to deliver the plaintiffs' goods. Under these circumstances the question is: Was the learned judge right in the course he took?

The general principle on which he acted is that laid down by s. 53, sub-s. 3, of the Sale of Goods Act, 1893, and this appears to be clearly the right principle where goods are delivered not of the right quality and the buyer elects not to reject them but to claim damages. Into the calculation for the purpose of applying this principle the contract price as such does not enter at all, though I suppose it may be an element in assessing the value.

The defendants rely on the rule laid down by Lord Esher M.R. in *Rodocanachi* v. *Milburn*. (1) He said: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods." In those cases the elements for comparison are, in general, the contract price and the market price at the date when the goods should have been delivered or accepted, as the case may be, and if in such cases sub-contracts are not to be taken into account I do not see why they should be in such a case as the present. Indeed on the facts of the case there are special reasons against doing so. The sub-contracts were not for the identical goods, being for bleached instead of grey cloth, and they might or might not be performed by delivering the goods the subject of the head contract. The decision in *Rodocanachi* v. *Milburn* (2) was followed in the House of Lords in *Williams* v. *Agius*. (3)

(1) 18 Q. B. D. 67, 77. (2) 18 Q. B. D. 67.
(3) [1914] A. C. 510.

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

Warrington L.J.

But it is said that the present case is governed by *Wertheim* v. *Chicoutimi Pulp Co.* (1) That was an action for delayed delivery of goods. The purchaser had sold the goods, the subject of the head contract, at a price exceeding that prevailing at the date of delivery, and it was held that the higher price so obtained must be substituted for the lower one as one of the elements of comparison. I do not think the present case is governed by *Wertheim's Case.* (1) The purchaser here has received inferior goods of smaller value than those he ought to have received. He has lost the difference in the two values, and it seems to me immaterial that by some good fortune, with which the plaintiffs have nothing to do, he has been able to recoup himself what he paid for the goods. If the goods had been of the quality contracted for he might have sold them at a higher price and made a profit. In truth, as I have already pointed out, in the class of case we are dealing with, the contract price does not directly enter into the calculation at all.

On the whole I agree that the appeal fails.

SCRUTTON L.J. In this case I personally desired to reserve judgment, because of a question of the measure of damages of some general importance.

Slater & Co., whom I call "the sellers," sold to Hoyle & Smith, whom I call "the buyers," certain cotton goods, 3000 pieces, to a given specification. After the buyers had received part of them, 1625 pieces, they refused to take any more—namely 1375 pieces—on the ground that the goods were so consistently and seriously below contract quality that there was no reason to believe that goods would be delivered in accordance with the contract. The sellers thereupon brought an action against the buyers for damages for refusing to accept 1375 pieces. The buyers counterclaimed for failure to deliver 1375 pieces according to contract, and for delivering 1625 pieces of inferior quality.

As is usual, experts for both parties made an examination of what was treated as a sample of the goods actually

(1) [1911] A. C. 301.

delivered, in this case 20 pieces, about 2600 yards, and gave contradictory evidence as to their condition and their compliance with the specification. The judge saw the witnesses and the goods, and heard their explanations of the defects in the goods produced, and he has found that the goods were not merchantable under the contract description. The appellants have not satisfied me that he was wrong in this. Some of the goods delivered, about 690 pieces, were delivered to a sub-buyer from the buyers. The sub-buyer made oral complaints but did not reject the goods, and though at the time of the trial he was claiming on the buyers, he had not taken any actual legal proceedings. As he was using the goods for the manufacture of shirts, probably the measure of damages and test of merchantable character were entirely different from those in the principal contract. There was less evidence about these goods than about the twenty pieces which both sides treated as a sample of the delivery, but in view of the way in which the case was fought on the sample bales, the judge below did not make any distinction between the goods delivered to the sub-purchaser and the rest of the bales, and I do not see my way to differ from him. Taking this view, the judge below gave judgment for the defendants. He, however, gave them only nominal damages for the 1375 pieces not delivered, as the market price had fallen below the contract price, so there was no loss. The buyers had claimed loss of profit under a contract, or a price higher than the market price; this the judge refused them as the parties had not contracted with reference to the sub-contract. As to the 1625 pieces delivered, the judge gave them the difference between the market price of sound goods and the market price of the goods as delivered. These market prices he took on a general average, though scientifically the measure should have been taken at the date of each delivery, an almost impossible task. His assessment was objected to by the appellants, and was no doubt somewhat rough and conjectural, but I see no reason to interfere with it if the principle is the principle to be applied.

A point, however, was raised on which the Court desired

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

Scrutton L.J.

to consider its judgment. It was said that as the sub-buyer of the 691 pieces delivered under the sub-contract had made no claim on the buyers, his sellers, the buyers, should not recover anything for the inferiority in the goods they redelivered to him ; for, as the sub-buyer had paid the buyers their full contract price, to allow them to recover in addition something for the inferiority would be to give them more if the goods were inferior than they would have got if they were sound and were to be delivered. It is to be observed that the buyers had two contracts with the sub-buyer, the first below the market price, the second above it. Neither sub-contract formed the basis of the original contract ; the buyers were under no obligation to deliver the goods of the original contract to the sub-buyer, and in fact they delivered under the first sub-contract a large quantity of goods not obtained from the sellers. Further, the judge has refused to make the sellers pay the profits which the buyers might have made by supplying sound goods from this contract under their second sub-contract, but the sellers, though freed from liability for the higher price of the second sub-contract, desire to take advantage of the lower price of the first sub-contract. Can they do so ? It is well settled that damages for non-delivery or delay in delivery of goods, where there is a market price, do not include damages for the loss of any particular contract unless that contract has been in contemplation of the parties to the original contract : *Horne* v. *Midland Ry. Co.* (1) The value of the goods in the market independently of any circumstances peculiar to the plaintiff is to be taken : *Great Western Ry. Co.* v. *Redmayne* (2) ; *Williams* v. *Reynolds* (3) per Blackburn J. If the plaintiff has a profitable contract to sell goods, and there is a market, he can supply himself with the goods by purchasing in the market ; and he is then left without the goods he should have received under the original contract and has lost their market value. But suppose his sub-contract is at a price below instead of above the market price, so that, if he delivers goods

(1) (1873) L. R. 8 C. P. 131. (2) L. R. 1 C. P. 329.
(3) (1865) 6 B. & S. 495, 505.

under the sub-contract, he loses. Can his damages be limited by the amount he would have received on the sub-contract ? On the above reasoning it would seem not. He could supply the sub-contract by buying in the market, and then should have goods delivered to him of a certain market value, which he has lost because they were not delivered. This has been decided in the case of non-delivery of goods by the Court of Appeal in *Rodocanachi* v. *Milburn* (1), and by the House of Lords in *Williams* v. *Agius* (2), where *Rodocanachi* v. *Milburn* (1) was approved. In *Rodocanachi* v. *Milburn* (1) goods should have arrived by a certain ship at a date when a certain market price prevailed. The owner had made a sub-contract to deliver similar goods at a price below the market price. It was argued that if the goods had arrived the owner would only have received a price less than the market price, and that he ought not to get more by their non-arrival than by their arrival. The Court of Appeal rejected this argument, holding that the value of the goods must be assessed independently of any circumstance peculiar to the plaintiff, "and so independently of any contract made by him for sale of the goods." In *Williams* v. *Agius* (2) the House of Lords approved this. In that case A. had not delivered coals which he had sold at 16*s.* 3*d.* a ton to W. At the time when they should have been delivered the market price was 23*s.* 6*d.* ; but W. had sold a similar quantity and description of coals at 19*s.* ; the question was whether A. ought to pay 7*s.* 3*d.* a ton damages, or only 2*s.* 9*d.* a ton, being the amount W. would have received if he had fulfilled his sub-contract. The House of Lords held the damages were 7*s.* 3*d.* a ton, approving *Rodocanachi* v. *Milburn* (1) ; and Lord Dunedin (3) held that the defaulting seller is neither mulct in damages for the extra profit the buyer would have got owing to a forward sale at over the market price, nor can he take benefit of the fact that the buyer has made a forward sale at under the market price. He put the case as a dilemma : "The truth is that the respondents' argument leaves them in a dilemma.

(1) 18 Q. B. D. 67. (2) [1914] A. C. 510.
(3) [1914] A. C. 523.

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

Scrutton L.J.

Either the sub-sale was of the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns."

Now apply these principles to the delivery of goods not sound but damaged. The only difference appears to be that in the case of non-delivery the buyer has not got the goods and has not paid their contract price; what he has lost is the difference between the market price of the goods and the contract price he would have to pay to get them. If the goods are delivered damaged, he has got goods and has paid the contract price; what he has not got is sound goods, and his loss is therefore the difference between the market value of sound goods and the market value of these damaged goods. Again, sub-contracts do not come into account, for the buyer is under no obligation to use these goods for his sub-contract; he may buy in the market, and he will then be left with goods damaged to a certain extent at the then market price of such goods instead of sound goods at the then market price of sound goods. The difference between the two market prices should be the measure of damages. If the buyer delivers under the sub-contract the damaged goods and has to pay damages, these damages will not be the measure of damages.

As Lord Dunedin says (1): "How can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract?" If these damages are greater than the difference in market price of sound and damaged goods, they will clearly not be recoverable. The result seems the same if they are less; it is res inter alios acta: "circumstances peculiar to the plaintiff," which cannot affect his claim one way or the other. If the buyer is lucky enough, for reasons with which the seller has nothing to do, to get his goods through on the sub-contract without a claim against him, this on principle cannot affect his claim against the seller any more than the fact that he had to pay very large damages on his sub-contract would affect his original seller.

In support, however, of the proposition that the sellers could be relieved by what took place under the sub-contract, the case of *Wertheim* v. *Chicoutimi Pulp Co.* (2) was relied on. This is a decision of the Privy Council, and though not technically binding on us, is of course entitled to the greatest respect. It was a claim for delay in delivery. The contract was to deliver wood pulp in November, 1900, when the market price was 70*s.* a ton. The pulp was delivered in July, 1901, when the market price was 42*s.* 6*d.* a ton; but the buyer had made a sub-contract for sale at 65*s.* a ton. The Privy Council only gave the buyer 5*s.* a ton damages. It is difficult to see how this fits in with the principles above stated. If the buyer had made a sub-contract at 30*s.* a ton and only received that sum, it seems clear that the Privy Council would not have given him 40*s.* but only 27*s.* 6*d.* a ton, for they would have said the seller had nothing to do with the sub-contract. If the buyer had made a forward contract at 80*s.*, and lost it, the Privy Council would not have given him 37*s.* 6*d.*, but only 27*s.* 6*d.*: *Horne* v. *Midland Ry. Co.* (3); again for the reason that the seller had no concern with matters peculiar to the buyer. The buyer was under no obligation to deliver the contract goods on the sub-contract. If he had

(1) [1914] A. C. 510, 523. (2) [1911] A. C. 301.
(3) L. R. 8 C. P. 131.

C. A. 1919

SLATER AND ANOTHER v. HOYLE AND SMITH.

Scrutton L.J.

bought other goods and used them for the sub-contract, he would have been left with goods delivered at a time when the market price was 42*s.* 6*d.*, instead of when it was 70*s.*, and would have recovered 27*s.* 6*d.* Lord Atkinson says (1) that in the case of non-delivery the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter. It is always so treated, as I understand the law, unless the buyer can affect the seller with such notice of the sub-contract as makes him liable for loss by its non-fulfilment. But he goes on to say that the existence of a sub-contract shows that the real value of the goods is more than the market value and the loss he sustains must be measured by that price. I respectfully think that all the English decisions show that a plaintiff cannot measure the real value of what he has lost by reference to a contract peculiar to himself, for which the defendant is not responsible, and that his loss therefore is not measured by that price.

Wertheim v. *Chicoutimi Pulp Co.* (2) was a case of delay in delivery and not, as the present, a case of delivery of inferior goods. I should myself have thought the principles applying to these two cases were the same as those applying to non-delivery, and that the Privy Council judgment was erroneous as departing from those principles. But at any rate it does not decide the case of delivery of inferior goods instead of sound goods, which appears to me the same as the case of non-delivery of any goods at all. It is true that on these principles the plaintiff may recover more than an indemnity. English law frequently gives him less than his real loss. The plaintiff in *Horne* v. *Midland Ry. Co.* (3), a case of delay, certainly sustained a real loss greater than the amount he recovered. The plaintiff in *British Columbia Sawmill Co.* v. *Nettleship* (4), a case of non-delivery, certainly recovered much less than his real loss. He sometimes recovers more than his real loss. The plaintiffs in *Salford Corporation* v.

(1) [1911] A. C. 301, 307.
(2) [1911] A. C. 301.
(3) L. R. 8 C. P. 131.
(4) (1868) L. R. 3 C. P. 499.

Lever (1) recovered their real damage twice. The rules of English law do not always give exact indemnity, and in this case I think they do not.

For these reasons I think that Greer J. was right in disregarding the fact that the buyers, for reasons we do not know, were able to deliver inferior goods under their sub-contract without having to pay damages, just as he would have been right in disregarding the fact if they had had to pay larger damages than the difference in market value.

In my view the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Barlow, Barlow & Lyde, for James Chapman & Co., Manchester.*

Solicitors for respondents: *Haslam & Sanders, for Denham & Jackson, Manchester.*

W. H. G.

[IN THE COURT OF APPEAL.]

WILSON SHIPPING COMPANY, LIMITED *v.* BRITISH AND FOREIGN INSURANCE COMPANY, LIMITED.

C. A. 1919 *Nov.* 20, 24; *Dec.* 5.

[1919. W. 572.]

Insurance (Marine)—Partial Loss—Damage unrepaired—Subsequent total Loss—Merger.

By a time policy the owners of a steamer insured her with certain underwriters against marine risks only, but including particular average. The vessel was in the service of the Admiralty under a charterparty by which the Admiralty contracted to pay for loss by war risks the ascertained value of the steamer, if she were totally lost, at the time of the loss. During the currency of the policy the vessel sustained damage by marine risks; the damage was not repaired, but it depreciated her value by 1770*l.* On a subsequent voyage during the currency of the policy the vessel became a total loss by war perils. The Admiralty in consequence of the unrepaired damage paid the owners 1770*l.* less than they would otherwise have paid.

(1) [1891] 1 Q. B. 168.

C. A.

1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

In an action by the owners to recover from the underwriters their proportion of the 1770*l.* :—

Held, that as the partial loss continued to the prejudice of the owners notwithstanding the subsequent total loss, there was no merger of the former in the latter, and that the underwriters were liable.

Livie v. *Janson* (1810) 12 East, 648 commented on and distinguished.

Judgment of Bailhache J. reversed.

APPEAL from the judgment of Bailhache J. (1)

The plaintiffs, the owners of the steamship *Eastlands*, claimed to recover from the defendants their proportion of the sum of 1770*l.*, being the amount deducted by the Admiralty in paying the plaintiffs for the total loss of the vessel by submarine attack on January 25, 1918.

At the date of her loss the *Eastlands* was insured with the defendants against marine risks only, but including particular average, under a time policy dated March 16, 1917, for twelve calendar months from February 20, 1917. Attached to the policy were the Institute Time Hull clauses, one of which provided that "in no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy."

The *Eastlands* was under charter to the Admiralty on the T. 99 form, under which the Admiralty contracted to pay for the loss by war risks of steamers chartered to them, the value to be ascertained at the date of the loss.

During the currency of the policy but on a voyage before that on which the *Eastlands* was totally lost she sustained damage by marine perils. The damage was not repaired but it depreciated her value at the date of her loss by the sum of 1770*l.* The Admiralty accordingly paid the plaintiffs 1770*l.* less than they otherwise would have done, and the plaintiffs contended that the underwriters must make this sum good. The defendants contended that they were not liable to pay for damage to a vessel if before repair the damage was followed by a total loss during the currency of the same policy.

Bailhache J. gave judgment for the defendants.

The plaintiffs appealed.

(1) [1919] 2 K. B. 643.

R. A. Wright K.C. and *Jowitt* for the appellants. The appellants have insured themselves against damage to this ship by marine perils; they have suffered damage by marine perils; yet Bailhache J. has held that the respondents, the insurers, are not liable to make good the loss. He has held them excused because during the currency of the policy the ship became a total loss by war perils, and therefore the partial loss was merged in the total loss. As supporting this conclusion the learned judge relied on *Livie* v. *Janson*. (1) That case does not support the conclusion. It is explained by Willes J. in *Lidgett* v. *Secretan*. (2) When an owner insures his ship against perils of the sea and on a voyage during the currency of the policy the ship is first damaged and then totally lost, the underwriter pays a sum equal to the value of the ship at the commencement of the risk: Marine Insurance Act, 1906, ss. 16, 67. In that case he does not pay for partial losses occurring before the total loss, because in general an assured cannot recover more than an indemnity. That is one case of merger. Another case is where the owner insures his ship by one policy against sea perils and by another policy against war perils, and the ship is first damaged by sea perils and then totally lost by war perils. There (assuming that war perils are the real cause of the loss) the war risk underwriters pay the value of the ship at the commencement of the risk and the owner recovers nothing for the damage from the marine risk underwriters, for the same reason as before; he cannot have more than an indemnity. A third case is where the owner insures against sea perils but not against war perils, and the ship is first damaged by sea perils and then lost by war perils. In this case the owner is said to be his own insurer as to war perils; he puts himself in the position of an underwriter against war perils, and risks a loss equal to the value of the ship at the commencement of the risk. There is no reason why the marine risk underwriters should pay when the owner is his own insurer and escape payment if the owner gets a policy

(1) 12 East, 648. (2) (1871) L. R. 6 C. P. 616.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

underwritten. *Livie* v. *Janson* (1) was an example of this. There the owner insured his ship by a policy of insurance against perils of the sea warranted free from American condemnation. The ship ran on the rocks and was damaged, and then she was captured and condemned by the American Government; and it was held that the owner could not recover for the damage against the underwriters. All these cases rest on the assumption that when the total loss occurs the owner recovers or otherwise provides for a sum equal to the value of the ship at the date not of the loss but of the commencement of the risk. To allow him more than this would be to allow him more than an indemnity. But if this assumption is not warranted, and if, when the total loss occurs the owner recovers no more than the value of the ship at the time of the loss, then he is not prevented from recovering for an antecedent partial loss. At any rate *Livie* v. *Janson* (1) does not prevent him from doing so. Lord Ellenborough C.J. took pains to except the case where deterioration before total loss may affect the assured's interests; he said (2): "We think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. . . . . There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." In the present case the previous deterioration materially affected the assureds' interests and was anything but a matter of perfect indifference to them. It made a difference of 1770*l.* in the amount recoverable from the Admiralty. In *Knight* v. *Faith* (3) the previous partial loss proved prejudicial to the assured

(1) 12 East, 648. (2) 12 East, 654.
(3) (1850) 15 Q. B. 649.

in that it lessened the price for which the vessel was afterwards sold, and it was held that the assured might recover the amount of the loss. The assured is entitled to recover the amount by which the ship is deteriorated in consequence of the accident: *Stewart* v. *Steele*. (1) It is true he has no vested cause of action as soon as the injury is sustained, but must wait till the expiration of the risk before he can sue the underwriters: *Pitman* v. *Universal Marine Insurance Co.* (2); that is, in the case of a voyage policy, the end of the voyage; in the case of a time policy like the present, the end of each voyage: *Stewart* v. *Merchants Marine Insurance Co.* (3) Liability to the amount of 1770*l.* had accrued under the respondents' policy before the *Eastlands* started on her last voyage. When liability has attached it can only be discharged by release or accord and satisfaction. It follows that the respondents are liable.

MacKinnon K.C. and *Claughton Scott* for the respondents. This question was concluded in the year 1810 by *Livie* v. *Janson*. (4) If a shipowner, insured against one risk and uninsured against another, suffers a partial loss by the former and then a total loss by the latter, the underwriters of the first risk are not liable. This has been recognized in many reported cases and by writers of authority on marine insurance: *Stewart* v. *Steele* (1); *Knight* v. *Faith* (5); *Lidgett* v. *Secretan* (6); *Pitman* v. *Universal Marine Insurance Co.* (2); Arnould on Marine Insurance, 9th ed. 1914, vol. ii., p. 1289, s. 1032; Halsbury, Laws of England, vol. xvii., s. 929, p. 469. The same principle must apply if he is partially instead of being wholly uninsured against the second risk. The only distinction is that he divides the second risk between himself and the underwriters of that risk. But this is a distinction without a difference. The appellants were their own insurers in so far as the Admiralty charterparty left them uncovered. A total loss

(1) (1842) 5 Sc. N. R. 927.
(2) (1882) 9 Q. B. D. 192.
(3) (1885) 16 Q. B. D. 619.
(4) 12 East, 648.
(5) 15 Q. B. 649.
(6) L. R. 6 C. P. 616.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

having occurred through the second risk the respondents, underwriters of the first risk, are not liable. The appellants' loss is due to their not having fully insured their vessel against war risks.

Wright K.C. in reply. The principle of *Livie* v. *Janson* (1) ought not to be extended. It rests on the assumption that the assured is fully indemnified. Where the facts contradict the assumption the principle does not apply: *Knight* v. *Faith.* (2) If a ship, insured against sea perils including particular average, suffers damage, and while unrepaired is lost through the negligence of a port authority, who only pay as damages her value at the time of the loss, why should not the owners recover for the partial loss under the policy? The appellants were not fully indemnified.

[WARRINGTON L.J. If there had been no contract of insurance in the Admiralty charterparty *Livie* v. *Janson* (1) would have barred your way.]

In that case the appellants would have had to attack *Livie* v. *Janson.* (1) On the facts of this case it is distinguishable.

[*Woodside* v. *Globe Marine Insurance Co.* (3) and *The Dora Forster* (4) were also cited.]

Cur. adv. vult.

1919. Dec. 5. The following written judgments were delivered:—

BANKES L.J. The appellants' vessel, the *Eastlands*, was insured under a time policy for a year underwritten by the respondents against the usual marine perils, including particular average, but excluding war risks. During the currency of the policy the vessel sustained damage by the perils insured against. The vessel was taken to Cardiff and dry-docked, and some of the necessary repairs were done. The cost of these repairs was 928*l.* 14*s.* 8*d.* The estimated cost of the necessary repairs, the doing of which was postponed, was 1770*l.* Shortly after the vessel left Cardiff,

(1) 12 East, 648.
(2) 15 Q. B. 649.
(3) [1896] 1 Q. B. 105.
(4) [1900] P. 241.

and during the currency of the policy, she was torpedoed and became a total loss. At the time she was lost she was under charter to the Government upon terms which entitled the owners to be paid by the Government the value of the vessel at the time of the loss. The Government claimed that the value of the vessel at that time had been depreciated by her want of repair to the extent of the estimated cost of the necessary repairs, and they accordingly deducted the sum of 1770*l.* from the amount they would otherwise have paid the appellants. The appellants claimed that they were entitled to be paid by the respondents the two sums of 1770*l.* and 928*l.* 14*s.* 8*d.* The respondents paid the latter, but refused to pay the former. Hence the present action, the respondents contending that, the vessel having become a total loss during the currency of the policy, the appellants were not entitled to recover anything in respect of partial unrepaired damage. Bailhache J. has accepted this contention. After a review of the authorities he states that in his opinion the law stands thus : " Whether an underwriter is or is not liable for unrepaired damage cannot be ascertained until the expiration of the policy. If before the expiration of the policy there is a total loss, he is not liable to pay for the earlier unrepaired damage sustained during the currency of the same policy, and it makes no difference whether the total loss falls upon him, or is due to an excepted peril against which the owner is insured or uninsured." The appellants challenge the accuracy of both branches of the learned judge's conclusion.

I have no doubt as to the correctness of the learned judge's view as to the time at which the liability of the underwriter is to be ascertained, though I should prefer to substitute " termination of the risk " for the expression " expiration of the policy." It seems to me that there may be cases, of which the present is one, in which the latter expression would fail to do justice to the assured's position.

In the present case it was contended that the assured had a vested cause of action in respect of the particular average loss, either at the termination of the voyage which

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Bankes L.J.

the *Eastlands* completed after leaving Cardiff dry-dock, or alternatively at the time when she entered the dry-dock for the purpose of being repaired. The case of *Stewart* v. *Merchants Marine Insurance Co.* (1) was cited in support of this contention. The language of Lord Esher M.R. in that case must be read with reference to the facts he was dealing with, and in my opinion does not support the appellants' contention. In the case of *Stewart* v. *Steele* (2) a claim was made against underwriters for the cost of unrepaired damage to a ship which was subsequently sold to be broken up. Maule J. when dealing with the contention that the plaintiffs in that case had a vested right of action at the moment of the happening of the loss which nothing could afterwards divest, points out that the principle had already been established that the proper time to estimate the loss where the party is put to no expense is at the expiration of the risk. To the same effect is the judgment of Lindley J. in *Pitman* v. *Universal Marine Insurance Co.* (3), where he says: "Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained." The reason for this rule no doubt is that according to accepted practice, now embodied in s. 16 of the Marine Insurance Act, 1906, the insurable value of a ship is the value at the commencement of the risk. Hence if in an open policy the assured in case of a total loss receives the full value of his vessel at the commencement of the risk, he cannot claim to have been damnified by the fact that during the currency of the policy the vessel had suffered damage, which had not been repaired, and in consequence of which therefore he had been put to no expense. In the case of a valued policy where the

(1) 16 Q. B. D. 619. (2) 5 Sc. N. R. 927, 949.
(3) 9 Q. B. D. 192, 197.

assured receives all that he bargained for, the case is even clearer. The law where a claim arises as between the same parties and on the same policy is now embodied in s. 77, sub-s. 2, of the Marine Insurance Act, 1906. In the present case the claims of the appellants are not under the same policy, or against the same parties. Their claim in respect of the total loss was against the Government, their claim in respect of the partial loss is against the respondents as underwriters of the policy covering marine risks. Bailhache J. is of opinion that this fact makes no difference, and he comes to that conclusion by an examination of the authorities. I am unable to agree with this part of the judgment of the learned judge. It does not appear to me that the cases which were cited to the learned judge and to which he refers, cover the particular point which has to be decided in this case. It must, I think, be decided upon principle and with the help to be derived from the reasoning of the learned judges to whose judgments we have been referred.

Livie v. *Janson* (1) is the case mainly relied upon by the respondents both in this Court and in the Court below. The facts in that case were that the vessel was insured from New York to London warranted free from American condemnation. She sailed from New York, and was shortly afterwards driven ashore by perils insured against and sustained serious partial damage. She was while in that condition seized and condemned by the American Government. The assured apparently claimed against the underwriters both for the total loss, and for the previous partial loss. In his judgment Lord Ellenborough C.J. appears to me to deal with the case from two separate points of view: first, whether the total loss of the vessel could in any sense be attributed to the causes which brought about the previous partial loss, and for this purpose he discusses the question of causa proxima; secondly, whether under the circumstances the assured suffered any pecuniary loss by reason of the damage to the vessel in respect of which any claim for indemnity could arise. The decision of the case proceeded

(1) 12 East, 648.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

apparently entirely upon the view of the facts taken by the learned judge. The only rule of law which he lays down is certainly not opposed to the present contention of the appellants. It is in these words (1): "Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against." The learned judge expressly confines the rule to a case where the previous deterioration becomes ultimately a matter of perfect indifference to the interest of the assured. In *Pitman's Case* (2) Cotton L.J. lays down the law thus: "Where in the case of a partial loss the owner has not repaired the vessel, he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against." If therefore the appellants had during the currency of the policy sold their vessel for a sum representing its value if repaired less 1770*l.* the cost of completing the repairs, it would seem clear that they would have been entitled to recover the 1770*l.* from the underwriters. If so, is there either principle or authority which compels this Court to say that though the 1770*l.* would be recoverable in the one case, it is not recoverable in the other, the loss to the assured being the same in both cases? I think not. As I have already pointed out, Lord Ellenborough C.J. in his statement of the rule in *Livie* v. *Janson* (3) impliedly recognizes the possibility of cases occurring in which the assured might be able to show that the previous deterioration of which the learned judge speaks might be of serious concern to him. In *Knight* v. *Faith* (4) Lord Campbell C.J.

(1) 12 East, 654.
(2) 9 Q. B. D. 192, 216.
(3) 12 East, 648.
(4) 15 Q. B. 649, 668.

commenting upon the argument in that case based on *Livie* v. *Janson* (1) says this : " The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired ; and, if a total loss occurs from which they are exempt, they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured." In *Lidgett* v. *Secretan* (2) Willes J. more than once points out what, in his opinion, was the reason for applying what he speaks of as the doctrine of merger, which is now incorporated in the rule as contained in s. 77, sub-s. 2, of the Marine Insurance Act, 1906. He says (3) : " The doctrine of merger cannot apply to such a case as this. The reason for applying it where the partial loss and the total loss occur during the continuance of the same risk is obvious : the parties never intended that the insurers should be liable for more than a total loss in any event " ; and, again (4) : " The authorities, when looked at, will be found to amount to this : A partial loss is not paid for if there is a total loss of the vessel during the period covered by the policy ; because, when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage, except such as fall within the suing and labouring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss ; and, if he were to pay for a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the assured against." The case with which we are now dealing is an exceptional one, in that under the Government contract the value of the vessel at the time she was lost is what the assured recovers. Under these circumstances the reasoning which underlies the so-called doctrine of merger does not appear to me to apply as the respondents are not liable for any portion of that value, and the appellants have suffered loss through the depreciation in the value of their vessel by the partial unrepaired damage. I think that they are entitled under these

(1) 12 East, 648.
(2) L. R. 6 C. P. 616.
(3) Ibid. 620.
(4) Ibid. 625.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

circumstances to be indemnified against that loss. Mr. MacKinnon suggested that the appellants had suffered no loss because they in fact received from the Government a larger sum than the amount of the valuation inserted in the policy underwritten by the respondents. This argument cannot succeed. The question is not what the appellants would have received under the latter policy had the vessel been totally lost owing to a marine peril but what have the appellants in fact lost under the contract with the Government by reason of the fact that the vessel had sustained the partial damage which had not been repaired. It is not necessary in the present case to express any opinion upon the construction put upon the judgment of Lord Ellenborough C.J. in *Livie* v. *Janson* (1) by Willes J. in *Lidgett* v. *Secretan* (2), where he deals with the case of the uninsured owner in respect of the total loss who claims against his insurer for partial unrepaired loss. In my opinion, the appeal succeeds, and the judgment must be set aside and judgment entered for the appellants for the amount claimed with costs here and below.

WARRINGTON L.J. The action in this case was upon a policy of marine insurance effected with the defendants by the plaintiffs on their steamship *Eastlands*, the plaintiffs claiming to be paid the estimated amount of an unrepaired partial loss arising from a marine peril. The loss is admitted and there is no dispute as to amount, but the defendants deny their liability on the ground that the ship, having become a total loss before the expiration of the risk from a cause not covered by the policy, that is, a war peril, they cannot be called upon to make good an unrepaired partial loss. Bailhache J. has adopted this view and given judgment for the defendants relying on the authority of *Livie* v. *Janson* (1), a decision of the Court of King's Bench. The plaintiffs appeal.

The Marine Insurance Act, 1906, contains no express enactment covering the case, s. 77, sub-s. 2, being confined

(1) 12 East, 648. (2) L. R. 6 C. P. 616, 625.

to an unrepaired partial loss followed by a total loss under the same policy, but it does contain a provision, s. 91, sub-s. 2, that the rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance.

The real question is, what is the scope of the rule laid down in *Livie* v. *Janson* (1), and does it, when properly understood and applied to the facts of this case, relieve the underwriters from their prima facie liability under the policy? The material facts are not in dispute and may be shortly stated. The policy is a time policy for a period commencing on February 20, 1917, and ending on February 20, 1918. The usual Institute time clauses including the free from capture and seizure clause are part of the policy. One of these is as follows: "In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy." This clause only applies if the total loss there referred to is one for which the underwriters are liable. The ship was under charter to the Admiralty. On October 29, 1917, she grounded while entering Dunkirk and sustained the damage in question. On November 5 she started on another voyage without being repaired and on December 15 she arrived at Cardiff where she went into dry dock. The necessary repairs were estimated at 2698*l.* of which repairs costing 928*l.* were effected, leaving damage unrepaired estimated at 1770*l.* On January 25, 1918, she became a total loss as the result of a war peril. By the charterparty the Admiralty undertook the risks of war, such risks being so undertaken "on the ascertained value of the steamer if she be totally lost at the time of such loss." The value of the ship was duly ascertained and paid by the Admiralty but they deducted from her value as a sound ship the 1770*l.* above mentioned, being the amount of the damage remaining unrepaired at the time of her loss. But for this damage the plaintiffs would have received her full value as a sound

(1) 12 East, 648.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Warrington L.J.

ship, and it is the 1770*l.* so lost that they seek to recover from the defendants. I ought to mention that for the purpose of the policy the ship was valued at 62,000*l.*, being some 20,000*l.* less than the ascertained value under the charterparty.

I now turn to the authorities in order to answer the question which, as I have said, is, I think, the real question to be determined. *Livie* v. *Janson* (1) was decided in 1810. In that case a ship was insured by a voyage policy warranted free from American condemnation. In the course of the voyage she ran ashore sustaining partial damage but next day was seized by the American authorities and was finally condemned, thus becoming a total loss. The owners sued the underwriters in respect of the partial loss. The judgment of the Court of King's Bench was for the defendants and was delivered by Lord Ellenborough C.J. In giving judgment Lord Ellenborough began by pointing out that the plaintiffs could not recover for the total loss, for though the marine peril—stranding—facilitated her subsequent capture and condemnation it was not the causa proxima of the total loss, and the plaintiffs could therefore recover, if at all, only for the deterioration of the ship and goods by reason of the sea damage. He then proceeded as follows (2): "Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters." He then gives a reason for the rule founded on the nature of insurance as a contract of indemnity and lays stress on the fact that in the case before the Court the persons who were prejudiced by the deterioration were the American Government who had seized the ship and cargo and not the assured, and he adds (3): "There may be cases in which, though a prior damage be followed by a total loss, the assured may

(1) 12 East, 648. (2) 12 East, 654.
(3) 12 East, 655.

nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." On this I think it is clear that the words, "And the previous deterioration becomes ultimately a matter of perfect indifference" to the interests of the assured, are an essential part of the rule and the underwriters cannot obtain the benefit of it without establishing the fact so expressed. Do the subsequent authorities in any way modify or affect this position? In *Knight* v. *Faith* (1) a ship was insured under a time policy expiring on September 23. Before the expiration of the risk she sustained partial damage from perils of the seas and after the expiration of the risk she was sold by the master under circumstances which the assured alleged amounted to a total loss under the policy. This point was decided against the assured, but it was further held that the ultimate loss of the ship did not prevent the assured recovering for the partial loss, for the partial loss continued to his actual prejudice and was not merged in any total loss for which the insurer was liable. The greater part of the judgment is devoted to the question whether the assured could recover as for a total loss. On the other point Lord Campbell C.J., delivering the judgment of the Court, says (2): "The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; and, if a total loss occurs from which they are exempt, they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured." He then refers to *Livie* v. *Janson* (3), mentioning in particular the fact that the assured in the event which happened were not in any degree prejudiced by the partial loss, and points out that in the case then before the Court the grounding of the ship had continued a prejudice to them ever since. It seems to me that in Lord Campbell's view, as in Lord Ellenborough's, it is only a partial loss which in the event does not prove prejudicial to the assured in respect of which he cannot recover.

(1) 15 Q. B. 649. (2) 15 Q. B. 668.
(3) 12 East, 648.

C. A.
1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Warrington L.J.

The next case is *Lidgett* v. *Secretan*. (1) There were there two voyage policies. Before the expiration of the risk under the first policy the ship sustained partial damage from a peril insured against, which remained unrepaired at the expiration of the risk. During the currency of the risk under the second policy she became a total loss. It was held that the assured were entitled to recover under the first policy for the partial damage and under the second for the total loss. This case, of course, differs from *Livie* v. *Janson* (2) in that the total loss occurred after the expiration of the risk covered by the policy under which the claim in respect of partial damage was made. It is this fact on which stress is laid by the judgment of Willes J. and the question of continuing prejudice by reason of the partial loss did not arise and was not in fact considered. I have carefully read the material part of the judgment of Willes J. (3) and I can find nothing in it which indicates that in his view the decision in *Livie* v. *Janson* (2) would have been the same if in fact the assured had suffered from the partial damage or loss continuing after and in spite of the subsequent total loss.

In *Pitman* v. *Universal Marine Insurance Co.* (4) the question arose as to the mode of ascertaining the sum payable by the underwriters in respect of unrepaired damage where the ship in her damaged condition was sold during the continuance of the risk. The only question was as to the amount payable by the underwriters, their liability being admitted. It is true that Lindley J. in his judgment (5) says: "If in such a case" (that is, in which a ship has been injured as the consequence of a peril insured against and is not repaired) "the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all." But this is a dictum only and, for the purpose of the case the learned judge was considering, the continuance after a total loss of the prejudicial effect of a partial loss was

(1) L. R. 6 C. P. 616.
(2) 12 East, 648.
(3) L. R. 6 C. P. 624 et seq.
(4) 9 Q. B. D. 192.
(5) Ibid. 197.

not material. None of the other cases seem to me really to bear on the point and certainly do not in any way conflict with the view that the fact that the deterioration as the result of partial damage ultimately becomes a matter of indifference to the assured is essential to a defence of the underwriters founded on the decision in *Livie* v. *Janson*. (1)

In the present case the plaintiffs have proved that the deterioration of the ship as the result of the unrepaired partial damage was a continuing prejudice to them notwithstanding the subsequent total loss. This partial damage arose from a peril insured against and in my opinion the defence to the plaintiffs' claim has not been sustained. It has been contended that the continuing prejudice results from the form of the contract under which war risks were covered and not from the peril insured against. The damage arises from the peril insured against and in my opinion it is immaterial to what circumstances the continuance of the resulting loss is due; if it in fact continues, this is enough to exclude the application of the rule in *Livie* v. *Janson*. (1) I also think the fact that the ship was valued for the purposes of the policy at a sum less than the net sum paid as compensation for her loss is irrelevant.

On the whole I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs for the 1770*l*.

SCRUTTON L.J. This appeal from Bailhache J. raises a difficult question of marine insurance. Shortly, the facts are that a ship insured by a time policy against perils of the sea suffered a particular average loss, part of which was repaired, and part, of the value of 1770*l*., left unrepaired, when on a subsequent voyage covered by the same policy the ship was totally lost by war perils. At the time she was under a Government charter, by the terms of which the Government paid in case of her loss by war risks her value at the time of the loss. They consequently deducted from her sound value 1770*l*. for the unrepaired damage. The assured then claimed on the underwriters for the repaired and

(1) 12 East, 648.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Scrutton L.J.

unrepaired damage by perils of the seas. The underwriters paid the repaired damage, but declined to pay the unrepaired damage, on the ground that it was merged in the total loss for which they were not liable. The judge has held the view of the underwriters correct, and the assured appeal.

The only assistance that the Marine Insurance Act, 1906, gives is contained in s. 77, sub-s. 2, of that Act: "Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss." The reason for this is fairly clear. The assured under an open or a valued policy in the case of a total loss recovers the sound value of the ship at the commencement of the risk: Marine Insurance Act, 1906, ss. 16 and 68; though there has been subsequent particular average damage before the total loss: *Shawe* v. *Felton* (1); or, in a valued policy, though she was not sound at the beginning of the risk, if there was no fraud in the valuation: *Barker* v. *Janson*. (2) If the assured recovers the whole value of the ship, to give him a partial loss in addition which has caused him no damage would give him more than an indemnity. If he has spent or become liable for money on repairs, this is an additional expense or loss to him caused by perils insured against, and he can recover this cost of repairs; not, however, if the repairs, though done, were done on bottomry, and the owner was only liable if the ship arrived safely, an event which did not happen: *The Dora Forster* (3), per Barnes J. So far the principle of indemnity, neither more nor less, is followed, which Bowen L.J. in *Castellain* v. *Preston* (4) said is a broad principle to be resorted to with confidence in any difficult question of insurance. The statute is limited to cases "under the same policy." The policy itself contains the clause: "In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the

(1) (1801) 2 East, 109.
(2) (1868) L. R. 3 C. P. 303.
(3) [1900] P. 241, 246, 249.
(4) (1883) 11 Q. B. D. 380, 401: "In all these difficult problems I go back with confidence to the broad principle of indemnity."

term covered by this policy." This only relates to total losses under the policy, and is inserted because of a preceding condition splitting the time policy into voyages, for the purposes of the 3 per cent. memorandum. The statute, however, by s. 91, sub-s. 2, continues the rules of common law so far as they are not inconsistent with the express provisions of the Act, and the judge below has arrived at his conclusion on the common law authorities.

Take next a case where a partial unrepaired loss under one policy is followed by a total loss not covered by the first policy but covered under another policy concurrent in time. There it has been decided by Mathew J. that the assured can recover under the second policy the full insured value of the ship at the commencement of the risk. In *Woodside* v. *Globe Marine Insurance Co.* (1), a ship insured by one policy against perils of the sea, and by another valued policy against fire, first suffered a heavy partial unrepaired loss by perils of the sea and then was consumed by fire. The assured recovered her full undamaged value on the fire policy, and consequently suffered no loss. Difficult questions, however, might arise if the assured sued first on the marine policy, and still more difficult questions if either underwriter who had paid a loss claimed to be subrogated to the rights of the assured against the other underwriter, on which I prefer to express no opinion, except that they should be worked out if possible on the broad principle of indemnity.

Come next to the case where the assured suffers a partial unrepaired loss by perils of the sea against which he is insured, and then loses his ship by perils not covered by his policy. This case arose in *Livie* v. *Janson* (2) before Lord Ellenborough and the Court of Common Pleas in 1810. A ship insured against perils of the seas "warranted free from American condemnation," in attempting to leave New York at night to avoid American embargo was driven ashore by ice and suffered damage. While ashore she was seized by the American Customs and condemned for breach of the embargo. The assured claimed on his policy, (1.) for a total, (2.) a

(1) [1896] 1 Q. B. 105. (2) 12 East, 648.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Scrutton L.J.

partial, loss. As to the total loss Lord Ellenborough held that the proximate cause was the condemnation, not the stranding. This part of the case has been doubted by Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (1) by the Court of Common Pleas in *Hahn* v. *Corbett* (2), and by Mr. Phillips in his standard work on Marine Insurance, ss. 1136 and 1743. It has, however, no bearing on the present case which is concerned with the claim for a partial loss. As to this, and the claim for total loss, Lord Ellenborough, in reserving judgment, said (3) it was "useless to be seeking about for odds and ends of previous partial losses which might have happened to a ship in the course of her voyage, when at last there was one overwhelming cause of loss which swallowed up the whole subject-matter." This appears rather to look at the state of the ship than at the pecuniary result to the owner, or any claim he might have for indemnity under the contract. In giving the reserved judgment, the Court laid it down as a rule (4) that "Where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim on the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against." I gather that, in a case where the Court thought the previous deterioration did affect the assured's interests, they would allow him to recover. Indeed, the Court say later (5), "There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." Such a case would apparently arise if the assured were insured against total loss by a policy which only gave him the value at the time of loss, in which case the previous

(1) (1863) 14 C. B. (N. S.) 259, 294, 295.
(2) (1824) 2 Bing. 205, per Best C.J. at p. 211; per Burrough J. at p. 212.
(3) 12 East, 652.
(4) 12 East, 654.
(5) 12 East, 655.

deterioration would affect his interests. I have, however, personally great difficulty in seeing how the previous deterioration in *Livie* v. *Janson* (1) did not affect the insured's interests. He had, when it happened, a damage to the ship, which would be made good at the expiration of the policy by a claim on the marine underwriter, and he had a damaged ship, the two together giving him a full indemnity. He lost the damaged ship, without having a claim against anyone for that loss, and he is said also and therefore to have lost his remedy for the previous damage, although it would seem that the loss of the ship as damaged, for which he was his own insurer, had nothing to do with the remedy and indemnity for the previous damage for which he was insured. This seems to infer from the fact that an owner is, to use the common phrase, " his own insurer," that he must be taken to have recovered the full sum he would have recovered if insured. But he does not recover that sum. Willes J. has given an explanation of the position in *Lidgett* v. *Secretan* (2), which, with the most sincere respect for that very great judge, I am also unable to understand. He says : " In such a case, the assured puts himself in the same position that the underwriter would have been in if he had insured against a total loss generally ; and therefore, when such loss arises, the underwriter must be considered by the terms of the contract to be in the same position as if he had so insured and had paid for a total loss, and consequently the claim for a partial loss falls to the ground." Why because the assured is uninsured against a total loss from specified causes the underwriter against loss from other causes is to be treated as if he had insured against losses against which he did not insure I fail to perceive. If " underwriter " is a slip for " owner his own insurer " the comment above applies.

Livie v. *Janson* (1) was held in *Lidgett* v. *Secretan* (3) not to apply where the total loss was under a subsequent policy to that under which the partial loss fell, because the loss

(1) 12 East, 648.
(2) L. R. 6 C. P. 616, 625.
(3) L. R. 6 C. P. 616.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Scrutton L.J.

was to be estimated at the end of the policy. It was also held not to apply in *Knight* v. *Faith* (1), where a sale without notice of abandonment, therefore not a total loss, took place after the expiration of the policy. In that case, however, Lord Campbell said (2): "If a total loss occurs from which they"—the underwriters—"are exempt, they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured," repeating the language of *Livie* v. *Janson* (3) but treating the damage in that particular case as a continuing prejudice because it lessened the selling value of the ship on sale.

I doubt myself whether *Livie* v. *Janson* (3), so far as it deals with an uninsured owner whose ship is totally lost, and who has no means of recouping himself that loss, is rightly decided. He seems to me to be prejudicially affected by the previous partial damage to the ship. But *Livie* v. *Janson* (3) has been cited without disapproval in several cases during its long life, though never, as far as I can find, when it was directly in point on the facts of the case, and I should be reluctant definitely to overrule it, unless it was necessary. The Court in *Livie* v. *Janson* (3) clearly contemplates cases where the existence of previous damage may affect the interests of the assured. Such cases appear to arise where owing to the previous damage the assured has a smaller claim for the total loss than he would otherwise have, as for instance where his policy covering total loss only covers the value of the ship at the time of the loss and, therefore, reduces her sound value by the previous damage; or where, as in this case, he can recover from his charterer only the value of the ship at the time of the loss, and the charterer therefore deducts the unrepaired damage from the sound value. A similar case would be where the damaged ship is sold during the currency of the policy for a smaller sum because of its damaged condition. As I have said, it is not necessary to decide whether an owner who has no remedy at all for the total loss is deprived of his claim for previous partial damage,

(1) 15 Q. B. 649. (2) Ibid. 668.
(3) 12 East, 648.

though it seems odd that he should recover, if his claim over is affected and reduced by previous damage, and not recover if he has no claim over at all, in which case he certainly is not indemnified for previous damage.

For these reasons, I am unable to agree with the judgment of Bailhache J., and think the appeal should be allowed and judgment entered for the plaintiffs for the amount claimed with costs here and below.

C. A. 1919

WILSON SHIPPING COMPANY v. BRITISH AND FOREIGN INSURANCE COMPANY.

Scrutton L.J.

Appeal allowed.

Solicitors for appellants: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., West Hartlepool.*

Solicitors for respondents: *Parker, Garrett & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A. 1919 *Nov.* 11, 12; *Dec.* 11.

RITTER *v.* GODFREY.

Practice — Costs — Discretion — Trial by Judge without Jury — Successful Defendant — Deprivation of Costs — Rules of Supreme Court, 1883, *Order* LXV., *r.* 1.

The plaintiff sued the defendant, a medical practitioner, for damages for negligence in attending his wife on the occasion of her confinement when her child was still-born. Upon the charge being made against him the defendant, in the course of a correspondence which took place before action brought, wrote to the plaintiff warmly repudiating it and fully explaining what took place at the confinement. Apart from the medical explanation, the letter was written in a tone of levity and in somewhat insulting terms, and finally suggested that the parties should submit the case for the arbitration of professional experts to be nominated on either side, and that the loser should give 20*l.* to charity. At the trial, without a jury, the judge found the issue of negligence in the defendant's favour and dismissed the action, but refused to give him costs on the ground, mainly, of the attitude taken by him in the correspondence.

Held, by the Court of Appeal, that the correspondence did not afford ground for the exercise of the judicial discretion to refuse to award

C. A. 1919

RITTER v. GODFREY.

costs to a successful defendant. It did not amount to conduct which led to the action being brought.

Per Atkin L.J. In exercising his discretion over costs a judge should be guided by the following principles. In the case of a wholly successful defendant the judge must give him his costs unless there is evidence (1) that the defendant brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains.

Decision of McCardie J. reversed.

APPEAL from the refusal of McCardie J. to give the defendant an order for his costs in an action of negligence which the learned judge had decided in his favour.

The facts of the case shortly stated were as follows. The defendant, a medical practitioner, was called in by the plaintiff to attend his wife on the occasion of her first confinement. It was admitted that the defendant was mistaken in his first diagnosis as to the nature of the birth presentation. He thought at first that it would be normal, but on a further examination under chloroform it proved to be a very difficult case of double extended breech presentation. He then properly treated it as such, but in the result the child was born dead. He continued to attend the patient until the plaintiff brought an accusation of negligence against him and requested him to discontinue his attendance. A correspondence, initiated by the plaintiff, ensued, and on April 8, 1918, the defendant wrote to the plaintiff a very long letter properly defending himself against the charge of negligence, but using in addition language of an insulting character, and concluding with a proposal that the case should be submitted for the opinion of medical experts, and that the losing party should pay 20*l.* to charity. Other letters followed on both sides, and in the result the plaintiff and his wife brought an action against the defendant for negligence as a medical practitioner, whereby the plaintiff was put to expense and his wife suffered pain, shock and injury to health.

The action was tried by McCardie J. without a jury, and he held that no case of negligence had been proved, and

dismissed the action. Upon the question of costs, however, the learned judge said that he did not entirely approve of the conduct of the defendant, and he found that the tone of his letters was unjustifiable and deplorable, and on these grounds he refused to give the defendant the costs of the action. The defendant appealed.

The Appellant in person submitted that there was no case for depriving him of the costs of the action in which he had succeeded.

J. B. Matthews K.C. and *Herbert Jacobs* for the respondent. This Court will not lightly interfere with the view of the trial judge in the exercise of the wide discretion vested in him by Order LXV., r. 1. The exercise of that discretion has been overruled in four cases only.

In *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1) it was held that there were no materials upon which the judge could exercise his discretion to deprive the successful defendants of their costs.

In *Granville* v. *Firth* (2) the defendant had done no more than avail himself of his legal defence under the Gaming Acts, and it was held that there was no good cause for depriving him of costs.

In *King* v. *Gillard* (3) it was held that a successful defendant cannot be deprived of costs on the ground of improper conduct not connected with the issue between himself and the plaintiff. And in *Edmund* v. *Martell* (4) it was held that where a judge has deprived a successful party of his costs in the absence of materials before him upon which he could exercise his discretion, an appeal will lie to the Court of Appeal without leave.

[ATKIN L.J. referred to *Higgins* v. *Higgins*. (5)]

There again there were no materials upon which the discretion could be exercised.

In exercising his discretion to deprive a successful litigant

(1) [1903] 2 K. B. 756.
(2) (1903) 72 L. J. (K. B.) 152.
(3) [1905] 2 Ch. 7.
(4) (1907) 24 Times L. R. 25.
(5) [1916] 1 K. B. 640.

BIBL. LONDIN UNIV.

C. A. 1919

RITTER v. GODFREY.

of costs the judge may consider his conduct previous to and conducing to the action: *Harnett* v. *Vise.* (1) Here the defendant's letters were of such an insulting character that they alone were sufficient materials for the judge to act upon, and this Court will not review the opinion formed by the judge as to the probable effect of those letters upon the plaintiff in inducing him to bring the action.

[LORD STERNDALE M.R. Can they afford a reason for depriving the defendant of his costs ?]

The levity in tone of the letters, the cause of action being negligence, was enough to make the plaintiff believe that he would be successful in the action.

If there are circumstances or matters fit and proper for the consideration of the trial judge on the question of costs this Court will not review the exercise of his discretion : *Huxley* v. *West London Extension Railway Co.* (2)

In *Bostock* v. *Ramsey Urban Council* (3), what constitutes "good cause" within Order LXV., r. 1, was discussed, and it was held that if there was evidence of "good cause" the Court could not review the exercise of the discretion.

[*Sutcliffe* v. *Smith* (4) ; *Brys & Gylson* v. *Imperial Steamship Co.* (5) ; *Lewin* v. *Trimming* (6) ; *Tenant* v. *Ellis* (7) were also referred to.]

Cur. adv. vult.

Dec. 11, 1919. LORD STERNDALE M.R. This appeal from a judgment of McCardie J. raises a difficult question, i.e., whether the learned judge was justified in refusing to make an order that the respondents should pay to the appellant the costs of an action by the respondents against the appellant, in which the latter was successful. The appellant, a doctor, conducted his own case and contended at great length that the learned judge had been misled into making the order which he did by a misunderstanding of the medical evidence in the case. I cannot see that he misunderstood it at all ; but in

(1) (1880) 5 Ex. D. 307.
(2) (1889) 14 App. Cas. 26.
(3) [1900] 2 Q. B. 616.
(4) (1886) 2 T. L. R. 881.
(5) (1918) 34 Times L. R. 300.
(6) (1888) 21 Q. B. D. 230
(7) (1880) 6 Q. B. D. 46.

C. A.
1919
RITTER
v.
GODFREY.
Lord Sterndale M.R.

any case I am quite clear that such misunderstanding, if it existed, had no bearing upon the question which we have to decide. I do not intend to deal with the details of the action further than is necessary to an understanding of the question before us. It was an action brought by the respondents, who are husband and wife, against the appellant for negligent conduct in his attendance upon the female respondent in her confinement, whereby her child was born dead and much suffering, trouble and expense caused. McCardie J. gave judgment for the appellant negativing negligence, but refused to make an order for his costs.

[The Master of the Rolls stated the facts and referred to the correspondence, in particular to the letter of April 8, and said that it gave the appellant's explanation of what took place at the confinement, about which it was sufficient to say that it was substantially accepted by the learned judge as correct. The Master of the Rolls then continued as follows :]

McCardie J. described the long letter of April 8 as a regrettable letter, and one that should not have been written by a doctor in the position of the appellant. I entirely agree with that opinion. I think that letter (though it was provoked by a rather offensive one from the respondent) was a letter that the appellant ought not to have written, and I shall be much surprised if he does not now think so. McCardie J., in his judgment after finding that the appellant had not been negligent, said that the letter of April 8 was one which he deplored, that it was a regrettable letter wholly lacking in sympathy for that which was a real sorrow to Mr. and Mrs. Ritter, and a letter which was inconsistent with the dignity which should ever be preserved by a member of a high profession. He added that there were other aspects of the case to which it might be necessary to refer if the defendant invited him to consider whether or not costs should be given in his favour against the plaintiff.

As the defendant's leading counsel was at that time not in Court, the question of costs was further discussed on a later date, when McCardie J. gave a further judgment in the course of which he said : " In my view there is ground for serious

C. A. 1919

RITTER v. GODFREY.

Lord Sterndale M.R.

criticism of Dr. Godfrey, even though the facts may not establish negligence. . . . . I have felt able, having regard to the totality of the evidence, to hold that the plaintiff has not established negligence against the defendant, but that finding, it must be clearly stated by me, in no way involves an approval by me of the totality of the matters which are relevant to the conduct of the defendant from first to last. . . . I feel clearly, moreover, that the whole of the correspondence from the pen of the defendant with regard to this is unsatisfactory. In my view the letter of April 8 in particular and certain passages of it with still more particularity, is not only unjustifiable, but deplorable from every point of view. I fully realise the duty which falls upon me of weighing all the circumstances of the case before I come to a conclusion upon the costs. I am fully aware that the discretion should be exercised upon grounds and with due regard to the interests of the parties. Applying myself, with a full conception of all that is involved in this matter, I have come to the clear conclusion that it is my duty to deprive the defendant of any costs in this case."

In my opinion the real ground for refusing to make an order for costs in favour of the appellant was the attitude taken by him in the correspondence, and the other matters were mentioned as throwing light on that letter. It could be no ground for refusing a successful litigant his costs that his evidence, which was accepted as in substance correct, was unsatisfactory in some respects.

In order to see whether the learned judge was justified in the course he took, it is necessary to consider the principles which govern a judge's discretion as to costs.

This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it

is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this Court cannot interfere with his discretion.

On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine.

One other consideration applies to these cases. The principle as to the exercise of discretion is the same in the case of plaintiffs and defendants, but it is clear that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will.

Speaking generally, I think it may be said that, in order to justify an order refusing a defendant his costs, he must be shown to have been guilty of conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought. This is so stated by Vaughan Williams L.J. in *Bostock* v. *Ramsey Urban Council* (1), and it generally may be tested by the question stated in the judgment of the two other members of the Court, A. L. Smith L.J. and Romer L.J. in the same case, i.e., was the defendant's conduct such as to encourage the plaintiff to believe that he had a good cause of action?

I do not say that this is the only test, but I think it is the one properly applied to this case. From this point of view I think the respondent's counsel was right in laying stress upon what he called the levity with which the appellant, in a part of his letter, dealt with the respondent's complaint, more than upon offensive expressions which would only tend to excite anger, and the question finally turns upon this point: Were the tone and the language of the letters such as fairly to lead the respondents to think that the appellant was likely to have

(1) [1900] 2 K. B. 625.

C. A. 1919

RITTER v. GODFREY.

Lord Sterndale M.R.

been negligent and to think that they could not accept the explanations given in the earlier part of the letter of April 6? I have had great difficulty in the case, and great doubts as to whether the letter did not afford some ground for refusing an order for costs, the sufficiency of such grounds, if existent, being entirely for the discretion of the judge, and not of this Court.

I cannot say that those doubts are entirely removed but, as both the other members of Court are clearly of opinion that the letter affords no such grounds, I concur in the decision to which they have come. The result is that the appeal must be allowed, the order of the learned judge set aside, and judgment entered in this action for the defendant with costs. The appellant is also entitled to the costs of the appeal.

ATKIN L.J. In order to determine this appeal it seems to me necessary to pass in review some of the more recent authorities which have dealt with the provisions of Order LXV., r. 1. Costs are to be in the discretion of the Court or judge. If this discretion is absolute the appellant must fail; if the discretion is limited, then the appellant must show that the exercise of the discretion in this case exceeded the proper limits. I think that it will appear from the authorities to be mentioned that the discretion of the Court or a judge is not an absolute discretion, but must be exercised subject to certain governing principles which in this appeal it seems to me necessary to ascertain.

The first group of cases to which I refer are cases dealing with the second proviso to the rule, namely, the conditions under which after trial by jury the judge may find that there is good cause for depriving the successful litigant of his costs. The subject-matter is not in terms identical with that before us. Nevertheless, where the Courts have held that there is good cause for deprivation of costs after trial by jury, I think it clear that under similar circumstances after trial without a jury the exercise of the discretion in the same way must be justifiable. If, on the other hand, there is held to be no good cause, I suppose it possible that the exercise of this discretion

in like circumstances might yet logically be supported, though, as will appear from the cases, it will be found in practice that the distinction tends to disappear.

The first case to which I shall refer is *Harnett* v. *Vise* (1), which was decided in 1880. I do not deal with the facts of it. It was the case of a trial by jury; and James L.J., in giving his judgment on appeal, says this: "It is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of."

The next case is *Sutcliffe* v. *Smith* (2) which was determined in 1886. That again was a case in which the question was, after trial by jury, whether or not the defendant was entitled to the property of a bankrupt by reason of his having a charge upon it for advances that he said he had made. The question had been determined on one occasion. The bankrupt had been examined on it in bankruptcy, and had given his answers which proved to be false and misleading; and afterwards the Trustee in Bankruptcy commenced an action against him. It was held that his false statements might have misled the Trustee into bringing the action, and therefore there was good cause for depriving the plaintiff of costs. Fry L.J. said: "Whenever a defendant had by his mis-statements made under circumstances which imposed an obligation upon him to be truthful and careful in what he said, brought litigation on himself, and rendered the action reasonable, there would be 'good cause' to deprive him of costs." In *Huxley* v. *West London Extension Ry. Co.* (3), decided in 1889, again after trial by jury, Lord Watson says: "I do not think that any and every reason which may be assigned for disallowing the costs of a successful party must necessarily be accepted as 'good cause' within the meaning of the rule. I shall not attempt a complete definition of what is meant by these words.

(1) 5 Ex. D. 307, 311. (2) 2 Times L. R. 881, 883.
(3) 14 App. Cas. 26, 33.

C. A. 1919

RITTER v. GODFREY.

Atkin L.J.

They at all events embrace, in my opinion, everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense." *Bostock* v. *Ramsey* (1) also deals with the question of good cause after trial by jury. A. L. Smith L.J. there says that in *Harnett* v. *Vise* (2) "it was distinctly held by the Court of Appeal that the judge is not confined, in considering the question whether there is good cause for depriving a successful party of costs, to the conduct of the parties in the litigation itself, but must consider the whole circumstances of the case and everything which led to the action. I think that in this case there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them, and which the judge was entitled to take into consideration as constituting good cause for depriving the defendants of costs." Vaughan Williams L.J. says: "The only question in this case comes to be whether there was conduct on the part of the defendants which can be considered as having led to the action being brought, and but for which it probably never would have been brought." And Romer L.J. in the same case says that good cause "is not confined to causes founded upon the conduct of the successful party in the course of the litigation. It might, for example, in the case of a successful defendant, be founded on conduct of the defendant outside the action, if the conduct was such as to have led the plaintiff reasonably to suppose that he had a good cause of action, and thus induced him to bring the action. I limit the proposition so as to show clearly that I do not consider that such conduct on the part of the defendant would constitute good cause within Order LXV., r. 1, if it had no reference to the action, and did not induce the plaintiff reasonably to believe that he had a right of action. Misconduct in no wise connected with the action could not be any ground for depriving a successful defendant of costs. Nor,

(1) [1900] 2 Q. B. 616, 622, 625, 627.

(2) 5 Ex. D. 307, 311.

I think, could conduct of the defendant outside the action constitute 'good cause,' if it were not such as to induce the plaintiff reasonably to suppose that he had a good cause of action, and so conduce to the action."

Those are cases where costs follow the event, unless the judge thinks there is good cause; and I think they limit and define the meaning of those words "good cause."

In *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1), there is a judgment of the Court of Appeal by Lord Halsbury, who was then presiding. That was a case tried before the judge alone, where the judge had discretion as to costs, and where he had deprived the successful defendants of the costs on the ground, as was assumed by the parties, that the defendants had refused to submit the matter to the arbitration of the judge himself. What is said by Lord Halsbury is this: "The defendants were sued, and rightly according to law resisted the suit, and finally succeeded. In the judgment of Bigham J., and in the judgment of this Court, they are right; and it practically comes to this—that the learned judge has deprived the persons sued of what, prima facie, is their right to the costs of the litigation which has unsuccessfully been brought against them because they will not submit to the learned judge himself as arbitrator to say what should be done. That is not exercising a discretion upon materials properly before the judge; but it is depriving a litigant of rights of which he is by law possessed, upon grounds which it is not competent for the judge to treat as grounds for the exercise of his discretion." It will be observed that the learned Lord Chancellor, in giving the judgment of the Court of Appeal, assumes that the practice is at any rate as uniform as this: that even in the cases that are left to the discretion of the judge, prima facie the discretion ought to be exercised in favour of the successful litigant; and the rule is such that it can properly be called a prima facie right, and it can be described as something to which the successful litigant is entitled. The next case is *King* v. *Gillard*. (2) All these subsequent cases are cases

(1) [1903] 2 K. B. 765. (2) [1905] 2 Ch. 7, 11.

C. A. 1919

RITTER v. GODFREY.

Atkin L.J.

where costs were within the discretion of the judge. It was a passing-off action, where the judge had held that there was no passing-off, but had deprived the defendant of his costs, on the ground that there were misleading and untrue statements in the advertisements upon the particular packages, which were calculated to deceive the public, though they had no bearing on the question of passing-off. Vaughan Williams L.J. first of all finds that the statements are not really dishonest statements. "But beyond that," he says, "even if the statement had been untrue, it would not in my judgment have been right to deprive successful defendants of their costs by reason of such a wrong done to the public, unless that wrong had been in some way connected with the wrong done to the plaintiffs as private individuals. In my judgment, when a plaintiff comes to the Court for relief, if, in the course of establishing the title on which he relies, he has been guilty of a fraud upon the public, it would be right to say to him: 'You cannot be allowed to come to the Court for relief, because your own conduct in establishing your own title has involved a fraud upon the public.' The Court has no right to deprive a successful defendant of his costs because he has done some act which is a wrong to the public. In order that he should be deprived of his costs, he must have done some wrongful act in the course of that transaction of which the plaintiff complains." Then Romer L.J. says (1): "Is the fact that there was upon the defendants' goods a statement as to a purely collateral matter which might be taken to be inaccurate qua the public at large, but which in no way concerned the plaintiffs or the rights in respect of which they are suing, a ground upon which a judge, in the exercise of his judicial discretion, can deprive the defendants of their costs, it being a matter in no way affecting the subject of the action or the plaintiffs' rights? In my opinion it is not." In *Edmund* v. *Martell* (2), heard in 1907, the successful defendant had been deprived of her costs on the ground that before she had done the acts which were complained of by her landlord, she ought to have consulted the landlord. There Lord

(1) [1905] 2 Ch. 12.

(2) 24 Times L. R. 25, 26.

Alverstone, who was presiding in the Court of Appeal, says, after referring to *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1), that the case then before the Court was an a fortiori case. "Sutton J. thought that because the defendant did not approach her landlord on the matter of converting the house into a shop she should be deprived of costs. That had nothing to do with the grounds of the action." Buckley L.J. said: "The facts upon which a judge could exercise his discretion in depriving a successful litigant of costs must be facts relevant to the question to be adjudicated upon as between the plaintiff and the defendant. The judge had no power to deprive the successful litigant of costs because in some matters not material he might think that that party should have behaved, say, with more courtesy or consideration. These were not matters upon which the Court could act."

I am glad to say I have now come to the last case that I think it necessary to cite, namely, *Higgins* v. *Higgins* (2) That was a case under the Workmen's Compensation Act, where the judge is given by the Act the same discretion as to costs as is given in the terms of Order LXV., r. 1. There the judge had made a declaration of liability, and had ordered the employers, who were considered by the Court of Appeal to have been successful, to pay his costs. Bankes L.J. says (3): "By para. 7 of Sched. II. of the Workmen's Compensation Act, 1906, the costs of and incidental to the arbitration and proceedings connected therewith are in the discretion of the arbitrator, just in the same way as the costs of proceedings in the High Court are in the discretion of the judge where the case is not tried by a jury under Order LXV., r. 1. In both cases, however, the discretion is fettered by a well-accepted rule which was stated by Lord Halsbury in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1) in these words 'No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal

(1) [1903] 2 K. B. 756. (2) [1916] 1 K. B. 640.
(3) Ibid. 643.

C. A. 1919

RITTER v. GODFREY.

Atkin L.J.

to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.' " Then he says: " This rule has been construed in that case," and other cases which he mentions, " as equivalent to saying that the Court has no right to deprive a successful defendant of his costs unless he has done some wrongful act which concerns the plaintiff or the rights in respect of which the plaintiff is suing." Then summing up at the end the learned Lord Justice says: " Upon the facts before the learned judge I can find no evidence that the employers were on any point unsuccessful, or that they had by their conduct in any way brought about the litigation, or done any wrongful act in relation to the plaintiff or his claim for compensation. According to the well-established practice therefore the defendants could not have been deprived of costs had they been asked for, and a fortiori could not have been ordered to pay the plaintiff's costs."

It is not easy to deduce from these authorities what the precise principles are that are to guide a judge in exercising his discretion over costs. And yet as the discretion is only to be exercised where there are materials upon which to exercise it, it seems important to ascertain the principles upon which a judge is to discern whether the necessary materials exist. In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3.) has done some wrongful act in the course of the transaction of which the plaintiff complains. These principles require further expansion.

By (1.) is meant—has so conducted himself as to lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, and so induce him to bring the action. The authority for this proposition is *Bostock* v. *Ramsey*. (1) It is wide, for in terms it is not limited to

(1) [1900] 2 Q. B. 616.

unreasonable or improper conduct, or to conduct other than that which constitutes the alleged cause of action. Inasmuch as the bringing of many actions of contract and most actions of tort is due to the effect upon the plaintiff's mind of defendant's conduct, and the effect is at any rate to induce a belief that the plaintiff has a good cause of action, it would appear to follow that provided the belief was reasonable the judge in all such cases has grounds for depriving a successful defendant of costs. I presume e converso there would be grounds for dealing with a successful plaintiff's costs when his conduct has induced the defendant reasonably to believe that he has a good defence.

I am inclined to think therefore that the propositions in *Bostock* v. *Ramsey* (1) should be read subject to the first, if not also the second, of the limitations suggested above—i.e., subject to the conduct being unreasonable or improper, and being conduct other than that which constituted the alleged cause of action. For the purposes of this case, however, I shall assume that they are to be read without the qualification suggested. (2.) and (3.) may possibly overlap. (2.), I think, would include improper conduct in or connected with the litigation calculated to defeat or delay justice. Such conduct would also be included in (3.), which, I think, further extends to cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public: *King* v. *Gillard* (2), by which I understand some criminal or quasi criminal misconduct, e.g., a fraud or crime or preparation for a fraud or crime, or possibly some act of serious oppression. Such conduct must, however, be in the course of the transaction complained of. If there is evidence of facts falling within the three classes above mentioned, then an appellate Court will not interfere with the discretion of the trial judge, even though they might not have come to the same finding of fact or exercised their discretion in the same way.

I am aware of the inconvenience of fettering by rules the exercise of what in terms appears to be an unfettered

(1) [1900] 2 Q. B. 16. (2) [1905] 2 Ch. 11.

C. A. 1919

RITTER v. GODFREY.

Atkin L.J.

discretion. But it is too late to contend for an arbitrary discretion over costs: some rules undoubtedly there are that control the discretion: and it seems hard to require a judge to exercise his discretion according to rule, and yet not to be able to state what the rule is. Nor if the rule is to be formulated does it appear helpful to cast it in the negative form of a string of prohibitions leaving the guiding principles to be deduced from them.

Applying, therefore, the principles above stated, was there here evidence of facts which the judge below could find to fall within one of the three classes mentioned?

I do not propose to detail the facts relied on. I agree with the statement of them by the Master of the Rolls. The charge was almost as serious a charge as could be made against a medical man who practised as an obstetrician: that by his negligence he had procured the child of a patient to be still-born, and caused unnecessary pain and suffering to the patient. The charge was formulated by the plaintiff at the first material interview and in his first letter. It was met by the defendant in the letter complained of with detailed explanations; and the explanations so given, the judge at the trial found to be accurate in fact, and to negative the negligence complained of. It is to be noted that the original mistake of the doctor in diagnosis was common ground alleged by the plaintiff and admitted by the defendant in the earlier letters. The material question between the parties was whether that original mistake was persisted in on and after the second examination of the patient, and whether, therefore, the subsequent conduct of defendant was consistent with reasonable care and skill. If, as I think was found by the learned judge, the explanations in the letter of April 8 were true statements of fact, and, as such, indicated that there had been no lack of reasonable care and skill, I cannot think that they afford evidence that they led the plaintiff reasonably to believe that he had a good cause of action. Apart from the explanations that they give on the matters relative to the cause of action there are expressions in them which I think the judge was justified in describing as deplorable, and I desire to associate myself with the

condemnation pronounced on them by the Master of the Rolls. They have caused me considerable anxiety on the point whether it fell within the ambit of the judicial discretion to deprive the author of them of his costs of successfully defending himself against a charge of professional negligence. I have come to the conclusion that they do not afford evidence of facts falling within the classes I have mentioned. Discourtesy between neighbours in dispute, even insulting language and behaviour, are unfortunately not as uncommon as they might be. In many cases the bitter letter or the verbal taunt has in a very real sense brought about the litigation, but I cannot think that a plaintiff so provoked to bring unfounded litigation is entitled to have his feelings salved by escaping costs. I think it probable that the tone of levity and what the plaintiff no doubt considered callousness of the letter of April 8, would be calculated to lead the plaintiff to attach less weight than otherwise he would to the defendant's explanations, and contradictions of the nurse; but the explanations were there. The nurse was wrong and the plaintiff's complaints were in fact unfounded.

In the present case I think that the expressions complained of could not lead the plaintiff reasonably to believe that he had a good cause of action against the defendant, nor could they amount to misconduct within the third rule.

For these reasons I think that the appeal should be allowed, and the order made as proposed by the Master of the Rolls.

EVE J. In this action the plaintiffs claimed to recover damages—general and special—from the defendant, a qualified medical practitioner—for alleged negligence in his attendance on the female plaintiff on the occasion of her first confinement. The particulars of negligence are enumerated under nine heads in the statement of claim, and the several allegations are not only serious in character but involve the charge that from the beginning to the end of his attendance on the female plaintiff the defendant was guilty of a series of negligent acts. The action came on to be tried before McCardie J. in

C. A. 1919

RITTER v. GODFREY.

Eve J.

May last, and on the 29th of that month the learned judge, after hearing the evidence, came to the conclusion that the defendant had not been guilty of negligence, and he dismissed the action. At the conclusion of his judgment he referred in terms of strong condemnation to a letter written by the defendant on April 8, 1918—some ten days after the occasion on which the negligence was alleged to have occurred—and, after a short discussion which followed the delivery of his judgment, adjourned for consideration on a later date the application for the costs of the action made by the defendant's counsel.

In the course of his comments on the letter I have referred to the learned judge said: "I could well understand the statement by Mr. Ritter in the witness box that one of the reasons which led him to bring this action was the unhappy wager, as Mr. Ritter called it, which was proffered by the defendant in connection with this matter," and the concluding passage of his judgment is in these terms: "There are other aspects of the case which I need not refer to, although it may be necessary to refer to them if the defendant invites me to consider in this case whether or not the costs should be given in his favour against Mr. Ritter."

The application for costs was persisted in and was disposed of on June 2, when the judge gave his decision in the words which have already been read, and which it is not necessary for me to read again, but it is not, I think, immaterial to observe that he prefaces this decision with a criticism of the defendant's conduct with respect to five, if not six, of the nine heads under which negligence had been charged, and from this, as from the concluding words of the earlier judgment which I have already quoted, it would almost appear that the learned judge, although he had decided in the defendant's favour on each of these heads upon the only issue raised in the action, was inclined to approach the determination of the question of costs from an attitude of doubt whether the defendant had really rebutted all the charges of negligence brought against him.

In this Court the case was argued on behalf of the respondents

on the footing that the judgment as to costs was founded on the view taken by the judge of the correspondence, but I cannot help thinking that the observations I have referred to lend some support to the appellant's contention that the learned judge's ultimate decision as to costs was to some extent based on a reconsideration of matters upon which he had already adjudicated in the appellant's favour, and it was this view which no doubt led to his importing into his argument in support of this appeal topics which eventually turned out to be irrelevant.

For in substance the question which emerges for decision is this: Does the correspondence which preceded the issue of the writ, and in particular the letter of April 8, disclose any ground for the exercise of the judicial discretion to refuse to award costs to a successful defendant?

It is contended that it does, because, it is said, it amounted to conduct which led to the action being brought, and in support of this contention Mr. Ritter's statement in evidence is strongly relied upon. The contention involves the consideration of what is meant by "conduct leading to the action being brought, and but for which it probably never would have been brought." It cannot, of course, refer to the act or conduct of the defendant constituting the cause of action—yet this would be the most obvious conduct leading to the action, and but for which the action would never have been brought, nor can it, I think, properly be extended to include the manner, tone, language or attitude adopted by the defendant in repelling or repudiating allegations which he believes—and as the result shows, rightly believes—to be wholly unfounded. To hold a man disentitled to his costs because he repels, and it may be with some warmth, an unjust accusation would be the negation of justice. The more unwarranted the accusation the greater in many cases the force with which it is repudiated, and it is within the experience of us all that the heat generated in certain disputes is not infrequently in inverse proportion to the importance of the issues involved. In one sense all these matters—the nature of the accusation made, the relationship of the disputants and the attitude and manner in which the

C. A. 1919

RITTER v. GODFREY.

EVE J.

accusation is met, may be said to involve conduct conducing to the action, and, it may be, finally depressing the scale in favour of litigation, but they cannot in my opinion, except in special circumstances such as I am about to refer to, be said to be conduct but for which the action would probably never have been brought.

I venture to suggest that in determining whether a good ground exists for the exercise of the judicial discretion, the judge must eliminate from consideration the conduct constituting the alleged cause of action, and must then inquire whether the defendant has so conducted himself ante litem motum (1.) as to induce in the plaintiff's mind the reasonable belief that there is no valid defence to the claim, or (2.) has so misconducted himself as to have goaded the plaintiff into a litigation on which he would never have embarked but for such misconduct. A persistent refusal on the part of an agent or trustee to answer inquiries, to give reasonable explanations, to impart information, or to render adequate accounts might well amount to conduct sufficient to induce a reasonable belief that a claim to recover moneys from him was maintainable, and provocative conduct or even truculent language might readily be shown to have compelled proceedings by a plaintiff who otherwise would never have gone to the extreme limit of instituting an action. In such circumstances there would exist ground for the exercise of the discretion, but in my opinion there must be something more than a repudiation, and even a forcible repudiation, of liability, something more than a display of bad taste, or even bad temper, some actual misconduct on the defendant's part before a foundation is laid for the exercise of the discretion. The judge, however much he may disapprove of the defendant's behaviour, is not entitled to refuse him his costs unless he has materials upon which he is prepared to hold judicially that the defendant has thereby created a mistaken belief in the plaintiff's mind or that his misconduct was the real cause of the action being brought.

Were there these materials in this case? It is impossible, in my opinion, to hold that there is anything in the letter of

April 8 calculated to create in the plaintiff's mind a reasonable belief that an action would succeed. The defendant dealt therein with the various charges made against him seriatim and in great detail and, as the result of the trial demonstrates, in a manner which ought to have satisfied the plaintiff, assisted as he says he was by competent medical advice, that the charges were not likely to be substantiated. Had the defendant shirked or even had he manifestly dealt inadequately with the charges the letter might perhaps have afforded ground for saying that he thereby induced the plaintiff to believe there was no real defence to the charges or some of them, but in all these respects the letter is, in my opinion, an emphatic repudiation of liability, and of any negligence, and a full and honest attempt to convince the plaintiff that there was no foundation for his aspersions.

There is therefore, in my opinion, nothing in the letter which affords material for suggesting that the letter misled the plaintiff and thereby led to the action being brought. On the contrary, a competent appreciation of this part of the letter ought to have prevented the action.

The next and only remaining question is, Is there material in the letter upon which it can properly be held that there was misconduct on the defendant's part of the nature I have indicated, that is to say, misconduct goading the plaintiff into a litigation on which he would not have embarked but for its existence? There is no evidence outside the letter itself to support this view. Mr. Ritter's statement, the truth of which I do not doubt, that the offer to leave the matter in dispute to be settled by arbitration (an offer which he seems, as I venture to think, mistakenly to have regarded as in the nature of a wager) was one of the reasons which led him to bring the action, only goes to prove that there were other reasons—a proposition confirmed, I think, by the plaintiff's own letters and the whole course of the proceedings—so that, even if this offer were misconduct on the defendant's part, and I do not think it was, it was not misconduct without which the action would not have been brought.

C. A.
1919
RITTER
v.
GODFREY.
Eve J.

I do not feel called upon to express any opinion as to the taste or want of good taste exhibited in the letter. It was written under difficulties by an overworked man smarting under a series of unjust accusations. What I am concerned in is to find any material in it for holding the defendant guilty of misconduct of the nature necessary to be found before any foundation could be laid for exercising against him a discretion which, in depriving him of his costs, has imposed upon him a grievous penalty in vindicating his professional reputation.

I have read and re-read the letter carefully, and I can find no such material. I think there was no evidence on which the learned judge's decision as to costs could properly be founded, and in my opinion this appeal ought to be allowed—the defendant ought to be awarded his costs of the action, and he will also be entitled to his costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Young, Jackson, Beard, and King.*

Solicitor for the respondents: *H. Dade & Co.*

G. A. S.

KOTZIAS *v.* TYSER.

1920
January 13.

[1919. K. 480.]

Insurance—Risk—Non-conclusion of Peace by given Date—"Termination" of War—Treaty of Peace—Ratification—Termination of the Present War (Definition) Act, 1918 (8 & 9 *Geo.* 5, *c.* 59), *s.* 1—*Treaty of Peace, June* 28, 1919, *Preamble; Art.* 440—*Proclamation, July* 1, 1919.

By a policy of insurance effected on November 2, 1918, during the European War, the defendant agreed to pay to the plaintiff a certain sum "in the event of peace between Great Britain and Germany not being concluded on or before June 30, 1919."

On June 28, 1919, these Powers signed a Treaty of Peace, but they did not exchange and deposit ratifications of the Treaty until January, 1920. In an action brought by the plaintiff against the defendant upon the policy in August 1919:—

Held, that peace had not been concluded between these Powers on or before June 30, 1919, within the meaning of the policy, and that the plaintiff was therefore entitled to succeed in the action.

ACTION in the Commercial List tried by Roche J.

At the outbreak of the European War in 1914, the plaintiff, N. K. Kotzias, was carrying on business as a Greek merchant. He was prevented by the war from continuing his business, but was desirous of resuming it when the war should come to an end.

In the meantime the plaintiff took steps to protect himself by insurance against the risk of the continuance of the war.

By a policy of insurance dated November 2, 1918, for the total sum of 3400*l.*, the defendant, G. W. Tyser, and others as underwriters, each for himself and not one for another, thereby agreed to pay to the plaintiff's brokers on behalf of the plaintiff the amount of their separate subscriptions "in the event of peace between Great Britain and Germany not being concluded on or before the thirtieth day of June One thousand nine hundred and nineteen."

On June 28, 1919, the Treaty of Peace between the Allied and Associated Powers, including Great Britain, on the one hand, and Germany on the other hand, was signed at Versailles. The preamble to the Treaty contained the following clause:

1920

KOTZIAS v. TYSER.

"From the coming into force of the present Treaty the state of war will terminate. From that moment, and subject to the provisions of this Treaty, official relations with Germany, and with any of the German States, will be resumed by the Allied and Associated Powers." Art. 440 of the Treaty was, so far as material, as follows: "The present Treaty, of which the French and English texts are both authentic, shall be ratified. The deposit of ratifications shall be made at Paris as soon as possible. Powers of which the seat of Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible. A first procès-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of the Principal Allied and Associated Powers on the other hand. From the date of this first procès-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty. In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification. The French Government will transmit to all the signatory Powers a certified copy of the procès-verbaux of the deposit of ratifications."

On July 1, 1919, His Majesty issued a Proclamation which, after reciting that the Treaty had been concluded, provided as follows: "In conformity thereunto We have thought fit hereby to command that the same be published in due course throughout all Our Dominions: and We do declare to all Our loving subjects Our Will and Pleasure that upon the exchange of the Ratifications thereof the said Treaty of Peace be observed inviolably as well by sea as by land and in all places whatsoever: strictly charging and commanding all Our loving subjects to take notice hereof and to conform themselves thereunto accordingly."

On August 21, 1919, the plaintiff brought the present action

1920

KOTZIAS v. TYSER.

against the defendant upon the policy of insurance, claiming to recover from the defendant 45*l.* 9*s.* 1*d.*, being the amount of his separate subscription.

The plaintiff, in his points of claim, stated that by the policy the defendant undertook to pay to the plaintiff the said sum in the event of peace between Great Britain and Germany, who were then in a state or war with one another, not being concluded on or before June 30, 1919; and that peace between these countries was not, and had not been, concluded on or before that date.

The defendant, in his points of defence, stated that he denied that peace between Great Britain and Germany was not and had not been concluded before June 30, 1919; and alternatively that he would contend that having regard to the Termination of the Present War (Definition) Act, 1918, (1) and in the absence of a declaration thereunder by His Majesty in Council at the date of the issue of the writ, the action was prematurely commenced and would not lie.

Ratifications of the above-mentioned Treaty of Peace were not exchanged by the signatory Powers until January 10, 1920.

Foote K.C. (*Merlin* with him), for the plaintiff.

The plaintiff is entitled to recover from the defendant

(1) Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59) intituled "An Act to make provision for determining the date of the termination of the present war, and for purposes connected therewith."

[November 21, 1918.]

Sect. 1: "(1.) His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and the present war shall be treated as having continued to, and as having ended on that date for the purposes of any provision in any Act of Parliament, Order in Council, or Proclamation, and, except where the context otherwise requires, of any provision in any contract, deed, or other instrument referring, expressly or impliedly, and in whatever form of words, to the present war or the present hostilities: . . . .

"(2.) The date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the treaty or treaties of peace: Provided that, notwithstanding anything in this provision, the date declared as aforesaid shall be conclusive for all purposes of this Act.

"(3.) His Majesty in Council may also similarly declare what date is to be treated as the date of the termination of war between His Majesty and any particular State."

1920

KOTZIAS v. TYSER.

the latter's proportion of the policy money. On the true construction of the policy of insurance, the event on the happening of which the money was to become payable, namely, "the event of peace . . . . not being concluded on or before June 30, 1919," did in fact happen. According to any meaning that the parties can have intended by these words, or that can be attributed to them, peace was not concluded, or, in other words, the war did not terminate on or before the date specified.

Peace was not concluded by the date specified within the meaning of the policy, if that expression is there used in the sense in which it is ordinarily used in international law. By international law, in the absence of any statutory or contractual provision to the contrary, a treaty of peace, except when personally concluded by the Sovereign or some person occupying a station equivalent to that of a Sovereign, does not become definitely binding upon a signatory State until there has been ratification of it by that State: Hall's International Law (6th ed.), pp. 322, 554; and Wheaton's International Law (5th English ed., 1916), pp. 358-360. In the present case, although the Treaty of Peace was signed on June 28, 1919, two days before the date mentioned in the policy, it was not ratified on or before the latter date or indeed until January 10, 1920.

Again, peace was not concluded on or before the date specified in the policy if the expression be used with reference to the provisions of the Termination of the Present War (Definition) Act, 1918. By s. 1, sub-s. 1, of that Act(1) the date of the termination of the war for the purposes of any contract, deed, or other instrument, and therefore for the purposes of this policy, shall, except where the context otherwise requires, be the date to be declared by an Order in Council made under the Act; and by s. 1, sub-s. 2, (1) the date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the Treaty of Peace. There is nothing in the context of this policy which otherwise requires than that the date of the termination

(1) See note on preceding page.

of the war for the purposes of the instrument should be the date declared by an Order in Council under the Act. It is true that no Order in Council has as yet been made declaring a date; but when an Order in Council is made, the date which it declares as that of the termination of the war cannot be a date on or before June 30, 1919, the date mentioned in the policy, because by the last-mentioned sub-section the date declared is to be as nearly as may be the date of the exchange or deposit of ratifications of the Treaty of Peace, and there was no exchange or deposit of ratifications of this Treaty until January 10, 1920.

Further, peace was not concluded by the date specified in the policy if the expression be read in accordance with the provisions of the Treaty of Peace of June 28, 1919, itself. That Treaty provides, by the last clause of its preamble, that, from its coming into force, the state of war will terminate, and by Art. 440, after specifying the date of the coming into force of the Treaty for certain purposes which it is not material to consider, it goes on to provide that in all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification. Thus according to this view of the expression also peace was not concluded until the Treaty was ratified, and therefore not on or before the date mentioned in the policy.

Moreover, peace was not concluded on or before the date in question according to the Proclamation of July 1, 1919. That Proclamation, after reciting that a definitive Treaty of Peace was concluded on June 28, 1919, declares that upon the exchange of ratifications thereof the said Treaty shall be observed inviolably. The Proclamation describes the Treaty of Peace as "definitive," meaning that it is a Treaty the terms of which are to be defined; and it in effect declares that the date of the coming into effect of the Treaty of Peace is to be defined by the date of the exchange of ratifications thereof, which as already stated more than once did not take place on or before the date specified in the policy.

1920

KOTZIAS v. TYSER.

R. A. Wright K.C. and *Simey* for the defendant.

The plaintiff cannot recover from the defendant upon the policy of insurance.

The policy provides that the sum insured is to become payable "in the event of peace between Great Britain and Germany not being concluded on or before June 30, 1919." The event of peace not being concluded on or before the date specified did not happen within the meaning of the policy. In other words, in the contemplation of the policy peace was concluded, or the war terminated, on or before that date.

In construing this policy regard must be had to its object, context, and circumstances. The plaintiff's business had been suspended by the war, but he desired to resume it as soon as it again became possible to do so. He effected the policy as a man of business in order to safeguard himself in the meantime against the risk of its not being possible to resume business on or before the specified date. In this policy the words "in the event of peace . . . . not being concluded" by that date must be read as meaning in the event of there not being such a conclusion of peace by that date as would allow of a resumption of oversea trade. The mere signing of the Treaty of Peace involved such a conclusion of peace as was contemplated by the policy, and as that took place on June 28, 1919, two days before the date specified in the policy, the event upon which the policy money was to become payable, did not in fact happen within the meaning of the policy.

Even if the policy be construed without special reference to its business object, the event which it contemplates of peace not being concluded on or before the date specified did not happen, inasmuch as the Treaty of Peace was signed two days before that date, and it is immaterial that it was not ratified until after that date, namely, until January 1920. By international law, a treaty of peace, as from the date of signature, and before ratification, is so far binding that hostilities must immediately cease: Hall's International Law (6th ed.), p. 554. The Treaty of Peace Act, 1919 (9 & 10

Geo. 5, c. 33), which was passed on July 31, 1919, after the Treaty of Peace was signed, but before it was ratified, nevertheless regards the Treaty as concluded and binding, seeing that it is entitled an Act for carrying into effect the Treaty, and provides by s. 1 for giving effect to the Treaty by Orders in Council and otherwise. The Proclamation of July 1, 1919, though made before the Treaty of Peace was ratified, nevertheless speaks of it as "definitive," meaning by that term final or conclusive.

Many other Acts and Government notices have regarded peace as concluded, or the war as terminated, by this Treaty of Peace or by one of the other international treaties of peace of even date before the Treaty was ratified. The Restoration of Pre-War Practices Act, 1919 (9 & 10 Geo. 5, c. 42), which was passed on August 15, 1919, by s. 1, sub-s. 1, provides as to trade practices or customs, which had been departed from "during the war" pursuant to the Munitions of War Act, 1915 (5 & 6 Geo. 5, c. 54), Sched. II., that there shall be a restoration of these practices and customs two months after the passing of the Act, that is on October 15, 1919, and thus treats the war as ended before the ratification of the Treaty. The Anglo-French Treaty (Defence of France) Act, 1919 (9 & 10 Geo. 5, c. 34), which was passed on July 31, 1919, sets out in a Schedule the Anglo-French Treaty of June 28, 1919, in Art. II. of which reference is made to the Treaty as "concluded," although it had not then been ratified. That Act in the Schedule also sets out as an Annex to that Treaty the Treaty of the same date between the United States and France, Art. II. of which speaks of that Treaty as having been "concluded" although it had not been ratified. Several notices affecting trade, issued by the Board of Trade after the Treaty of Peace had been signed but before it was ratified, treat peace as having been concluded. See, for example, the notice printed in the "Board of Trade Journal," vol. 103, p. 433 seq. [the weekly part dated October 2, 1919], which refers to the war as being at an end, and to peace as concluded, and provides that any goods may be sent to or imported from Germany with certain exceptions.

1920

KOTZIAS v. TYSER.

The Termination of the Present War (Definition) Act, 1918 (1) does not imply that the construction which the defendant puts upon the policy is not the true construction of it. That Act does not require that the date declared by the Order in Council made under the Act shall be the date of the exchange or deposit of ratifications, but only that it shall be that date "as nearly as may be." No Order in Council has yet been made under that Act declaring what date is to be treated as the date of the termination of the war. If the Order in Council, when made, should declare a date later than June 28, 1919, the date of the signing of the Treaty, such for example as the date of its ratification, the war should not for the purposes of the policy be treated as having ended on the date so declared, because, within the meaning of s. 1, sub-s. 1, (1) of the Act, the context of the policy "otherwise requires." If, on the other hand, the Order in Council, when made, should declare a date on or before June 28, 1919, it would confirm the defendant's view of the construction of the policy.

ROCHE J. This is an action upon a policy of insurance dated November 2, 1918, by which in consideration of a premium paid by the plaintiff as the assured the underwriters, of whom the defendant is one, agree to pay to the brokers of the plaintiff on behalf of the plaintiff as principal the amount of their separate subscriptions "in the event of peace between Great Britain and Germany not being concluded on or before June 30, 1919." The plaintiff claims payment from the defendant of the sum underwritten by him as for a loss under the policy on the ground that peace between Great Britain and Germany was not concluded on or before June 30, 1919. The only question to be decided is whether peace was or was not concluded between these countries on or before the date specified.

I am told that a number of other policies have been effected, some of them between the same parties, in terms the same

(1) See note ante, p. 71.

as or similar to those of this policy, and that it will be of advantage to the parties to these other policies to know what interpretation the Court puts upon this policy. I desire, however, to say that in the present case I am only interpreting the words of the policy before me and not those of any other document.

This policy was effected on November 2, 1918, before hostilities between this country and Germany had ceased, but when the parties contemplated that they might soon cease. It is not contended on behalf of the defendant that the parties in effecting the policy meant by the conclusion of peace on or before June 30, 1919, a mere cessation of hostilities on or before that date; it is admitted that they meant a cessation of hostilities followed at the least by the making of a treaty of peace before that date. It is said on behalf of the defendant that the words meant that and no more and that peace was concluded on or before the date in question, because a Treaty of Peace between these countries was signed before that date. It is said on behalf of the plaintiff, on the other hand, that peace was not concluded on or before that date within the meaning of the policy, because, although the Treaty of Peace was signed before that date, ratifications of the Treaty by the high contracting parties thereto were not exchanged on or before that date, or indeed until January 10, 1920.

I accept the view contended for on behalf of the plaintiff, and I do so for several reasons. In the first place, the authorities show that, in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that as between civilized Powers who have been at war, peace is not concluded until a treaty of Peace is finally binding upon the belligerents, and that that stage is not reached until ratifications of the treaty of peace have been exchanged between them.

In the present instance, however, the matter does not rest there. The Termination of the Present War (Definition) Act, 1918, (1) which was passed during the war, and is entitled

(1) See note, ante, p. 71.

1920

KOTZIAS v. TYSER.

Roche J.

an Act to make provision for determining the date of its termination, provided by s. 1, sub-s. 1, (1) that His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and that the war shall be treated as having ended on that date for the purposes, except where the context otherwise requires, of any provision in any contract, deed, or other instrument, referring to the war; and, by s. 1, sub-s. 2, (1) that the date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the Treaty of Peace. It is to be observed that the Act speaks of the date of the termination of the war, and that the policy of insurance deals with the date of the conclusion of peace, but both must be treated as referring to the same event, and therefore to the same date. The Act contemplates that an Order in Council or Proclamation may be issued declaring what date is to be treated as the date on which hostilities terminated and peace was concluded. It is not disputed that no Order in Council or Proclamation in pursuance of the Act has yet been issued. That fact tends to confirm me in the opinion that peace had not been concluded on or before June 30, 1919.

It is also I think material in this connection to consider the provisions of the Treaty of Peace itself. In the recital or preliminary part of the Treaty it is stated that the Powers have agreed that from the coming into force of the Treaty the state of war will terminate. Art. 440 of the Treaty provides that a first procès-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by the Powers, that from the date of that first procès-verbal the Treaty will come into force between the Powers who have ratified it, and that in all other respects it will enter into force for each Power at the date of the deposit of its ratification. The Treaty of Peace thus provides that it is to come into force, or, in other words, that peace is to be concluded, by a deposit of ratifications of the Treaty, and a procès-verbal thereof. That was not accomplished until the present month

(1) See note ante, p. 71.

of January, 1920, and consequently it had not been accomplished on or before June 30, 1919, the date mentioned in the policy.

In view of these considerations, I am of opinion that peace can only be said to have been concluded at a date considerably later than June, 1919.

As to the contention that because the plaintiff is a man of business and was insuring himself against a business risk, a special meaning must be given in this policy to the words "in the event of peace not being concluded," I am not satisfied that that contention is well founded. Certain Board of Trade notices which were referred to no doubt treat peace as having been concluded for purposes of trade before June 30, 1919, or at least before the Treaty of Peace was ratified, but these documents must be read in relation to their own special purport, and they do not show that peace was concluded at so early a stage for any other purpose. Further I doubt whether the fact that this policy was effected by a man of business really assists the defendant because in my view, apart from a general licence to do so, trade with Germany could not have been renewed by men of business until after June 30, 1919.

It is argued that this action has been prematurely brought, inasmuch as no Order in Council or Proclamation in pursuance of the Act of 1918 (1) has yet been made declaring what date is to be treated as the date of the termination of the war, and until an Order or Proclamation is made it cannot be known when the war terminated and peace was concluded. In my view, that argument is not well founded. The Act provides by s. 1, sub-s. 2 (1) that the date declared by the Order in Council when made shall be as nearly as may be the date of the exchange or deposit of ratifications of the Treaty of Peace. On August 21, 1919, the date on which the action was brought, there had as yet been no exchange or deposit of ratifications of the Treaty of Peace, and, that being so, the date to be declared by the Order in Council as that of the termination of the war could not well be an

(1) See note ante, p. 71.

1920

KOTZIAS v. TYSER.

Roche J.

earlier date than that on which the action was brought. It was therefore open to the plaintiff to say when he brought the action that peace had not even then been concluded, and therefore that it had not been concluded on June 30, 1919, the earlier date mentioned in the policy.

Judgment for plaintiff.

Solicitors for plaintiff: *W. W. Young, Son, & Ward.*
Solicitors for defendant: *William A. Crump & Son.*

J. R.

1919
Oct. 28.

C. A.

1920
Jan. 26, 27.

[IN THE DIVISIONAL COURT AND THE COURT OF APPEAL.]

BURCHELL *v.* THOMPSON.

JOHN E. HARRISON, LIMITED, CLAIMANTS.

Bill of Sale—Validity—Accordance with statutory Form—Advance to Third Party—Omission of Grantor's Receipt Clause—Copy filed with Registrar—"True copy"—Statement of Rate of Interest—Omission of Words "per annum"—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9; *Schedule.*

A bill of sale stated that in consideration of 250*l.* "now paid by the grantees to" a third person "at the request of the grantor," the grantor assigned to the grantees certain chattels by way of security for the payment of the sum of 250*l.* "and interest thereon at the rate of fifty-five per cent. per annum." The bill of sale, after stating that the 250*l.* was "now paid" by the grantees to the third person, did not add words acknowledging the receipt thereof. The bill of sale was in a printed form, and in the print the interest was stated to be at the rate of "one shilling in the pound per month," but in the bill of sale as executed the words "one shilling in the pound per month" were struck out, and "fifty-five per cent. per annum" were written in above them. The copy of the bill of sale filed with the Registrar was in a similar form, but in the statement of the rate of interest the words "per annum" were omitted:—

Held, that the bill of sale was void on the grounds: (1.) that, as the receipt clause was omitted, the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act, 1882; and (2.) that the copy filed with the Registrar was not a "true copy" of the bill of

sale within the meaning of s. 10, sub-s. 2, of the Bills of Sale Act, 1878, by reason of the omission of the words "per annum" in the statement of the interest, there being nothing in the rest of the document to supply the omission.

APPEAL from Dorking County Court.

A bill of sale dated January 29, 1919, and made between the defendant Percy William Thompson, poultry farmer, of Newdigate, Surrey, as grantor and the claimants, John E. Harrison, Ld., of London, registered money-lenders, as grantees, witnessed that "in consideration of the sum of two hundred and fifty pounds now paid by the grantees to Gordon Carpenter at the request of the grantor, he the grantor doth hereby assign unto the grantees and their assigns all and singular the several chattels and things specifically described in the Schedule hereto annexed by way of security for the payment of the sum of two hundred and fifty pounds and interest thereon at the rate of fifty-five per cent. per annum." And the grantor further agreed and declared that he would duly pay to the grantees the principal sum aforesaid together with the interest then due by the following instalments—namely, 15*l.* on February 28 then next following, and the like sum of 15*l.* on the twenty-ninth day of each and every succeeding month until January 29, 1920, when the balance of the principal sum together with the interest then due should be fully paid, and that in default of payment of any instalment of the principal sum he would pay interest on such instalment "at the rate aforesaid" from the date when the same should become due until payment thereof. And the grantor also agreed with the grantees that so long as any money should remain owing on the security of the bill of sale he would insure the said chattels and things against fire as therein provided, and that in default it should be lawful for the grantees to keep on foot or effect such insurance and charge the cost thereof "with interest at the rate aforesaid" to the grantor, and the same until repayment should be a charge upon the said chattels and things.

The bill of sale, after stating the payment of the consideration money, did not add the words "the receipt of which the

C. A. 1919

BURCHELL v. THOMPSON.

grantor hereby acknowledges," or any like words to suit the case of the receipt of money paid to a third person.

The bill of sale was in a printed form, and in the print the statement of the rate of interest was "one shilling in the pound per month." These words were struck out, and the words "fifty-five per cent. per annum" were written in above them. The copy of the bill of sale which was filed with the Registrar was in a similar form, but in stating the rate of interest it omitted the words "per annum."

The plaintiff recovered judgment against the defendant in the county court for 7*l.* 19*s.* 6*d.* for the hire of a motor car, whereupon, in February, 1919, execution issued, and possession was taken of the goods comprised in the bill of sale.

John E. Harrison, Ld., then claimed the goods under the bill of sale, but their claim was not admitted by the execution creditor (the plaintiff).

On April 11, 1919, at the trial in the county court of an interpleader issue between the claimants and the execution creditor, the county court judge held that the bill of sale was invalid on two grounds: (1.) because it was not "in accordance with the form in the schedule" to the Bills of Sale Act (1878) Amendment Act, 1882, as required by s. 9 of that Act, inasmuch as after stating the payment of the consideration money to Carpenter at the request of the grantor it did not add the words "the receipt of which the grantor hereby acknowledges," or any like words; and (2.) because the copy of the bill of sale filed with the Registrar was not a "true copy" within the meaning of the Bills of Sale Act, 1878, s. 10, sub-s. 2, inasmuch as in stating the rate of interest it omitted the words "per annum"; and the judge gave judgment for the execution creditor. (1)

The claimants appealed.

(1) Bills of Sale Act, 1878, s. 10: "A bill of sale shall be attested and registered under this Act in the following manner: . . . .

"(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the

1919. Oct. 28. *J. B. Matthews K.C.* and *S. J. Duncan* for the claimants.

Martin O'Connor and *G. F. Kingham* for the execution creditor.

C. A. 1919

BURCHELL v. THOMPSON.

LUSH J. In this case two questions arise for consideration, and I regret to say that I cannot concur in the decision of the county court judge upon either of them.

The first question is whether or not this bill of sale is void under the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, as not having been made "in accordance with the form in the schedule," to the Act as required by that section. The form of bill of sale given in the schedule to the Act is, so far as material, as follows: "This indenture . . . . witnesseth that in consideration of the sum of £ now paid to A. B. [the grantor] by C. D. [the grantee], the receipt of which the said A. B. hereby acknowledges . . . . he the said A. B. doth hereby assign unto C. D., his executors, administrators, time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale. . . . ."

Bills of Sale Act (1878) Amendment Act, 1882, s. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

"SCHEDULE.

"FORM OF BILL OF SALE.

"This Indenture made the day of , between A. B. of of the one part, and C. D. of of the other part, witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he the said A. B. doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. . . . ."

C. A. 1919

BURCHELL v. THOMPSON.

Lush J.

and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed. . . . ." It is said that this bill of sale is not in accordance with the statutory form because it omits the words " the receipt of which the grantor hereby acknowledges," and that because of this departure from the statutory form it is void. The county court judge took that view, and held that the bill of sale was void as not being in accordance with the statutory form. In coming to that conclusion he followed the case of *Davies* v. *Jenkins*. (1) On considering its facts, however, one finds that in that case the transaction was very different from the transaction in the present case. In that case the transaction was a mere advance of a sum of money by the grantee to the grantor—a class of transaction for which the statutory form makes express provision by including the clause by which the grantor acknowledges the receipt of the money. There the bill of sale omitted the grantor's receipt clause. The question arose whether the bill of sale was valid or invalid. The Divisional Court held that it was invalid on several grounds, the last of which was the omission of the receipt clause. In alluding to that last ground Darling J. said (2): " Even if the bill had stated the 50*l*. to be 'now paid,' it would have been bad for not containing a statement that the grantor thereby acknowledged the receipt of that sum, and for consequently departing from the statutory form." Apparently Channell J. entertained some doubt in regard to this ground, but in dealing with it he said (3): " I am inclined to agree . . . . that the bill was not in accordance with the form. I think that wherever part of the consideration is a present advance it is essential to the validity of the bill that it should contain an acknowledgment of the receipt of that advance." When one turns to the bill of sale in the present case one finds that it was not given and did not purport to be given in consideration of money paid to the grantor. The transaction was of a different kind. The consideration for this bill of sale was the payment of 250*l*.

(1) [1900] 1 Q. B. 133. (2) [1900] 1 Q. B. 136.
(3) [1900] 1 Q. B. 137.

by the grantee not to the grantor, but to a third party at the request of the grantor. When the money is paid by the grantee to the grantor, the transaction is one to which the words "the receipt of which the grantor hereby acknowledges" are appropriate. But when the money is paid by the grantee not to the grantor, but to a third party, the transaction is one as to which it is not apt to say that the grantor acknowledges the receipt of the money. In the latter case therefore, it is not appropriate to incorporate these words of the statutory form in the bill of sale. That being so, we are in no way bound by the decision in *Davies* v. *Jenkins* (1), but are free to express our own view as to how the present case ought to be decided.

We have here to inquire whether it is necessary to the validity of a bill of sale given in consideration for money paid by the grantee to a third party at the request of the grantor to insert in the deed a statement that the payment of the money to the third party is acknowledged or admitted by the grantor. In my opinion it is unnecessary to do so. It would add nothing to the efficacy of the deed if that statement were inserted. It detracts not from its validity if the statement is omitted. Inasmuch as all that is required in regard to the statement of the consideration for a bill of sale is that it be truly stated, it is amply sufficient in such a bill of sale as this to state that the money is paid by the grantee to the third party at the request of the grantor. Every statement in this bill of sale is contained in the form in the schedule to the Act, and there is no omission from the bill of sale of any statement of a material fact forming an element in the consideration or in any other part of the transaction. There is, therefore, here no departure from the statutory form.

I must add, in case it should be thought that I accept *Davies* v. *Jenkins* (1) as conclusive of the point which it does decide, that, after giving due consideration to the argument which has been presented to us, I cannot regard that case as a binding authority even on that point. The bill of sale was mainly impeached on other grounds and the dicta as to

(1) [1900] 1 Q. B. 133.

C. A. 1919

BURCHELL v. THOMPSON.

Lush J.

the receipt clause were not necessary to the decision. For my own part I should come to the conclusion that not even in the case where the money is paid by the grantee to the grantor is it essential to the validity of the bill of sale that it should contain a receipt clause. I agree that it has always been the practice in conveyancing to include in a deed a receipt clause after the statement of the consideration. It does not, however, follow that that clause is a necessary part of the deed. The materiality of the clause may be tested by considering what happens if it be omitted. Counsel for the respondent appears to admit that if the clause were included in the deed the grantor would not be estopped from proving that the money had not in fact been paid. The grantee is not affected by any estoppel whether the clause is omitted from the deed or not.

There was a time when Courts of common law and Courts of equity were distinct, and their practice differed. Formerly, it was thought that at common law, if the receipt clause was contained in a deed, there was an estoppel, and that if it was not in the deed there was no estoppel. It has long been clearly recognized, however, that there is no estoppel in the one case any more than in the other. Even before the Judicature Act, 1873, a party to a deed was not in every case estopped at common law from setting up the truth. Moreover, before the passing of that Act, whether the deed contained the receipt clause or not, it was always open to the party who had been misled to show in a Court of equity as against the grantor that the money had not been paid and to claim relief. The receipt clause is not so much, to quote the words of Lord Macnaghten in *Thomas* v. *Kelly* (1), "a characteristic of the statutory form" of the bill of sale, as to make its omission fatal to the validity of the document. There is in this bill of sale no real departure from the statutory form.

The next question is whether the copy of the bill of sale which was filed with the Registrar complied with the Bills of Sale Act, 1878, s. 10, sub-s. 2, which requires that a "true

(1) (1888) 13 App. Cas. 506, 520.

copy" of the bill of sale shall be filed with the Registrar as therein provided. It is quite possible in a case of this kind to find whether or not a copy of the original document is a true copy. The criterion, as laid down by the authorities, is to consider whether or not the copy differs from the original to such an extent that it would mislead any person of ordinary intelligence as to the effect of the original. It is said that the copy of this bill of sale which has been filed with the Registrar would mislead an ordinary person, because whereas the original deed described the interest as at the rate of so much per cent. per annum, the copy omitted the words "per annum." It is to be observed that the county court judge did not say that an ordinary person would be misled by this copy, but that a person who was "unsophisticated or unbusinesslike might . . . . be puzzled." He did not apply the right test, which, as I have said, is to inquire whether an ordinary person would be misled. In my opinion a person of ordinary intelligence would not be misled by this copy as to the effect of the original document. I cannot believe that a person who desired to know what the document meant would fail to understand that interest at the rate of 55 per cent. meant interest at that rate per annum.

I therefore think that this appeal should be allowed.

SANKEY J. I agree. The first question is whether the absence from this bill of sale of the grantor's receipt clause renders the instrument void under the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, as not having been made in accordance with the form in the schedule to the Act. The bill of sale witnesses that the grantor assigns the chattels to the grantees "in consideration of the sum of 250*l.* now paid by the grantees to Gordon Carpenter at the request of the grantor," but it does not add the words "the receipt of which the grantor hereby acknowledges." In *Thomas* v. *Kelly* (1) Lord Macnaghten pointed out that s. 9 of the Act of 1882 only requires that a bill of sale be made "in accordance with the form," and not "in the form" in the schedule.

(1) (1888) 13 App. Cas. 506, 520.

C. A. 1919

BURCHELL v. THOMPSON.

Sankey J.

[His Lordship read the form.] It appears to me that on the proper construction of that form the words "the receipt of which the said A. B. [the grantor] hereby acknowledges" have reference to a consideration consisting in a sum of money "now paid to A. B. [the grantor] by C. D. [the grantee]." When the consideration is other than that the words relating to the receipt of it do not necessarily apply. I think that these words do not apply in a case like the present in which the consideration consists of a sum paid by the grantee to a person other than the grantor. There is also, as counsel for the appellants has pointed out, another case that may well arise, in which these words would not apply, the case, namely, where the consideration consists of a sum to be paid in the future, or at any rate of a sum payable in instalments extending over several periods of which part is paid down and part is to be paid in the future. In neither of these cases would it be possible to adopt the words of the receipt clause contained in the form given in the schedule. In the former case the grantor could not acknowledge "receipt" of the money which was not paid to himself but to a third party. In the latter case he could not acknowledge receipt of it because it is not paid "now," but to be paid wholly or in part in the future. Whatever may be said as to the soundness of the decision in *Davies* v. *Jenkins* (1), and as at present advised I am not entirely satisfied that it is correct, I have no difficulty in believing that the view which I have just stated was there entertained by Channell J. In his judgment in that case, as reported in the *Law Times* (2), he said: "The statement of the consideration in a bill of sale is a matter of considerable importance. In the form in the Schedule when money is paid at the time, the receipt of the money is acknowledged." I should prefer to say, in the form in the schedule when the money is paid at the time "to the grantor" the receipt of the money is acknowledged by him, as I think the statement so altered would be more complete. When the money is paid at once to the grantor, the words are applicable. On the other hand, when the circumstances are different,

(1) [1900] 1 Q. B. 133. (2) 81 L. T. 788, 790.

as, for example, where the consideration is not paid at the time, or is not paid to the grantor, or is not even necessarily a sum of money, then the receipt of the consideration by the grantor need not be stated. It seems to me that the receipt clause is not an essential part of the form, and that it cannot be said that because this bill of sale omits that clause it is not made in accordance with the form. In my opinion the county court judge was in error on this point.

The second question is whether the omission from the copy of the bill of sale which has been filed with the Registrar of the words " per annum " in reference to the rate of interest prevents that copy from being a " true copy " within the meaning of the Bills of Sale Act, 1878, s. 10. sub-s. 2. It is to be observed that the words of the sub-section are not " exact copy " but " true copy." Here there is an omission from the statement in the copy of the rate of interest of the words " per annum."

We have been referred on behalf of the appellants to the case of *Sharp* v. *McHenry* (1), where Kay J., referring to certain blanks in the copy which had there been filed, observed (2) : " It is said that those blanks in the copy filed are fatal, because they make the copy not a ' true copy,' those blanks not occurring in the original mortgage. Well, in the first place, one must ask oneself, ' Is it possible that any human being could be mistaken as to the effect of the document ? Is there any wrong or damage which could arise to anybody from the blanks being left ? ' In one sense it is not a ' true copy,' because the blanks are not in the original bill of sale. But supposing the blanks had been in the original bill of sale, would it have been void ? Could any one reasonably maintain in a Court of justice that the original bill of sale would have been in the least degree affected if the blanks had been there ? In my opinion it could not. . . . ." Counsel for the respondent has endeavoured to show that some persons might be misled by the omission in the copy now in question, but he has failed to convince me that that would be at all likely. Kay J. continued : " Then is

(1) (1887) 38 Ch. D. 427. (2) Ibid. 448.

C. A. 1919

BURCHELL v. THOMPSON.

Sankey J.

there any untruth in this copy—untruth, I mean, upon an intelligent understanding of the Bills of Sale Act? In my opinion there is not. A true copy of a thing means a copy which is true in all essential particulars; the mere fact that a copy contains a blank which is immaterial, and cannot mislead anyone as to the effect of the instrument, does not make the copy an untrue copy within the meaning of the Act." I should have thought that it was obvious that the statement in this copy that the interest was to be at the rate of 55 per cent. meant that it was to be at that rate per annum. I should have thought further that the additional terms providing for the repayment of principal and interest by instalments in twelve months made it perfectly clear that that was the real meaning and intention of the parties. It seems to me that no ordinary human being, reading this copy, would mistake the meaning of the original document.

Appeal allowed.

J. R.

The execution creditor appealed.

1920. Jan. 26, 27. *Clayton K.C.* and *G. F. Kingham* for the execution creditor. The bill of sale is void on both grounds. First it is void because the receipt clause is omitted, and therefore the bill of sale is not in accordance with the form in the schedule as required by s. 9 of the Bills of Sale Act, 1882. In *Ex parte Stanford* (1) Bowen L.J., in delivering the judgment of the majority of the Court of Appeal, said: "A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute

(1) (1886) 17 Q. B. D. 259, 270.

to protect." The words of Lord Macnaghten in *Thomas* v. *Kelly* (1) are even stronger. He said: "This section"—s. 9 of the Act of 1882—"seems to me to deal with form, and form only. So purely is it, I venture to think, a question of form that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to s. 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody. It has been held, and I think rightly, that s. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are 'in accordance with the form,' not 'in the form.' But then comes the question, When is an instrument which purports to be a bill of sale not in accordance with the statutory form? . . . . Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form." The receipt clause in a deed is very material. Before the Conveyancing Act, 1881, if there was no receipt clause indorsed on a mortgage deed, a transferee of the mortgage took subject to inquiry whether the full amount stated to have been advanced had in fact been advanced; he could not rely upon a receipt clause in the body of the mortgage deed alone. To give him protection it was necessary that in addition to a receipt clause in the body of the mortgage deed a receipt for the debt should be indorsed on the deed: *Bickerton* v. *Walker* (2); *Bateman* v. *Hunt*. (3) A receipt need not now be indorsed on the deed; it is sufficient if it is in the body of the deed: Conveyancing Act, 1881, ss. 54, 55, 56; and the forms of statutory mortgage in the third and fourth schedules to the Act all set out the receipt clause in the body of the deed. The receipt within the deed has now the same effect as a receipt indorsed on the deed formerly had. A bill of sale comes within the definition of a "mortgage" in s. 2 (vi.) of the Act. The receipt clause is all important in the case of a transfer of the mortgage. It is, within the words of Lord Macnaghten

(1) 13 App. Cas. 506, 519. (2) (1885) 31 Ch. D. 151, 159.
(3) [1904] 2 K. B. 530, 539.

C. A. 1920

BURCHELL v. THOMPSON.

in *Thomas* v. *Kelly* (1), a "characteristic" of the form. It is not mere surplusage. *Renner* v. *Tolley* (2) shows that to constitute a receipt in a deed there must be express words acknowledging the receipt of the consideration. Therefore "now paid" is not a receipt. In *Davies* v. *Jenkins* (3) it was held by the Divisional Court that a bill of sale which omitted the receipt for the consideration was not in accordance with the form.

Secondly, the bill of sale is void under s. 10, sub-s. 2, of the Bills of Sale Act, 1878, and s. 8 of the Bills of Sale Act, 1882, because a "true copy" was not filed with the Registrar. In the statement of the rate of interest the words "per annum" are omitted. A person searching the register would see "one shilling in the pound per month" struck out and "fifty-five per cent." written in. He would be left in doubt whether the rate was per month, or per annum, or for any other period, and might thus be misled, or left in doubt whether the grantor was a person to whom he should give credit. In the form in the schedule to the Act of 1882 the relevant words are "and interest thereon at the rate of per cent. per annum [or whatever else may be the rate]." If "per annum" had been omitted from the bill of sale itself, the bill of sale would have been void as not being in accordance with the statutory form. If that be so, the copy registered omits a material part of the bill of sale and is not a "true copy." The omission is not a mere clerical error which cannot mislead anyone: *In re Hewer* (4); *Sharp* v. *McHenry*. (5) The bill of sale is therefore void.

[SCRUTTON L.J. referred to *Myers* v. *Elliott* (6), and *Blankenstein* v. *Robertson*. (7)]

A. Neilson K.C. and *S. J. Duncan* for the claimants. Sect. 9 of the Bills of Sale Act, 1882, requires a bill of sale to be "in accordance with," not "in," the form in the

(1) 13 App. Cas. 520.
(2) (1893) 68 L. T. 815.
(3) [1900] 1 Q. B. 133.
(4) (1882) 21 Ch. D. 871.
(5) 38 Ch. D. 427, 448, 449.
(6) (1886) 16 Q. B. D. 526, 531.
(7) (1890) 24 Q. B. D. 543.

schedule. The form states: "in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [or whatever else the consideration may be]." The words in brackets allow a certain amount of elasticity in the statement of the receipt. The receipt clause in the form is intended to be an example of a payment by the grantee to the grantor of the bill of sale. It is not intended to apply where the payment is to a third person, and it is not adapted to that state of facts. The words "now paid by the grantees to" the third person, without stating the receipt, are sufficient, and the omission of the actual words of receipt does not invalidate the bill of sale. There are many cases in which the grantor cannot acknowledge the receipt, and a receipt clause would be inappropriate. The words "now paid" to the third person are inserted as an alternative to the words before the brackets in the form, and are in the circumstances equivalent to a receipt within the meaning of s. 55 of the Conveyancing Act, 1881. As Lord Esher M.R. said in *Ex parte Stanford* (1): "If a bill of sale is a plain and simple document which would not deceive any ordinary borrower, the Court has never said that it must be set aside because it is not in the exact form given in the schedule." Bowen L.J. in giving the judgment of the majority of the Court upon the reargument of one of the points said (2) that a divergence from the form only became substantial or material when it was calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form, "or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." Here the words used cannot mislead. The receipt is not a "characteristic" of the form within the language of Lord Macnaghten in *Thomas* v. *Kelly*. (3) In *Davies* v. *Jenkins* (4) the advance was by the grantee to the grantor, and Channell J. seems to have decided with some doubt that the omission of the receipt rendered

(1) 17 Q. B. D. 264.
(2) Ibid. 270.
(3) 13 App. Cas. 520.
(4) [1900] 21 Ch. D. 871.

C. A. 1920

BURCHELL v. THOMPSON.

the bill of sale void. [*Edwards* v. *Marston* (1) was also referred to.]

Secondly, the omission of the words "per annum" in the statement of the interest in the copy of the bill of sale which was registered does not render the bill of sale void. The test is whether the omission would mislead anyone. "Fifty-five per cent." would naturally mean "per annum," and other clauses in the document may be looked at to supply the omission. The loan is to be repaid by instalments in twelve months, when "the balance of the principal sum, together with the interest then due, shall be fully paid." This shows that the interest is per annum. The omission is a mere clerical error and cannot mislead: *In re Hewer* (2); *Sharp* v. *McHenry*. (3) The bill of sale is therefore valid.

No reply was called for.

BANKES L.J. The question in this appeal is whether a bill of sale is or is not void. It is said that the bill of sale is void on two grounds; first, because it is not in accordance with the form in the schedule to the Bills of Sale Act, 1882; and, secondly, because the copy of the bill of sale which was registered is not a "true copy."

The first point arises under s. 9 of the Act of 1882: "A Bill of Sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." The section gives no discretion to the Court; the only question is whether a bill of sale is in accordance with the statutory form. In *Ex parte Parsons* (4) it was decided that if the arrangement between the parties cannot be made in accordance with the form it cannot be made at all. It has frequently been pointed out that the section provides that the bill of sale must be, not in the form, but in accordance with the form; and judges have indicated tests by which a particular transaction may be judged. In *Ex parte Stanford* (5) Bowen L.J. said: "We must take

(1) [1891] 1 Q. B. 225.
(2) 21 Ch. D. 871.
(3) 38 Ch. D. 427.
(4) (1886) 16 Q. B. D. 532.
(5) 17 Q. B. D. 271.

the form, interpreted by the light of the Act, on the one hand, the instrument to be discussed upon the other; and we must then consider whether, but for the avoidance inflicted by s. 9 of the statute, the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form, or whether the instrument in respect of such variance would be calculated reasonably to deceive those for whose benefit the statutory form is provided." In *Thomas* v. *Kelly* (1) Lord Macnaghten adopts another test: "When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form." There is another case—*Parsons* v. *Brand* (2)—which seems to me to be of great assistance in the present case, and in which it was pointed out that those tests are not exhaustive. The question there was whether under the Act of 1882 a bill of sale given by way of security was void unless both the address and description of the attesting witness appeared in the attestation clause. Cotton L.J. said (3): "The question is, whether s. 9 of the Act of 1882 makes these bills of sale void. With the policy of the Act we have nothing to do, we have only to carry out the intention of the Legislature as appearing in the terms of the Act. In the body of the Act there is no express direction that the address and description of the attesting witness to a bill of sale shall appear upon the bill of sale; but it provides that the bill of sale shall be void if not made in accordance with the form in the schedule to the Act." He then referred to the passage in the judgment of Bowen L.J. in *Ex parte Stanford* (4), and said, with reference to that judgment, that "the Court was there dealing with a case where the error was one relating to the effect of the contract; so the judgment must

(1) 13 App. Cas. 520.
(2) (1890) 25 Q. B. D. 110.
(3) Ibid. 113, 114.
(4) 17 Q. B. D. 271.

C. A. 1920

BURCHELL v. THOMPSON.

Bankes L.J.

be read with reference to that, and it must not be taken as intended to lay down a rule that nothing is a material departure from the form unless it alters the effect of the instrument. Then it is said, that 'add witness's name, address, and description' is no part of the form, but a mere direction outside the form. I do not so regard those words. They are a direction as to matters which have to be stated at the time when a bill of sale is given. The form contains a number of blanks for matters which could not be stated in a form, but which must be filled up to make a bill of sale in accordance with the form. Thus, for instance, the interest is left blank in the form. Can it be doubted that a bill of sale in which that blank was not filled up would be void? The time of payment is left in blank, but it clearly is essential that the blank should be filled up. I do not see how we can get out of this part of the form—a blank left to be filled up with an express direction that it shall be filled up. . . . . I say nothing as to the policy of the Legislature; we have only to give effect to what it has enacted, and I am of opinion that the omission of the name and description is fatal."

Lindley L.J. said: "I am sorry that I cannot see my way to any other conclusion. It is a hard thing to be obliged to upset a fair transaction because t's are not crossed and i's not dotted; but we must give effect to the Act, and I cannot see that a document is in accordance with the form unless all particulars are filled up which the form requires to be filled up." The judgment of Lopes L.J. is to the same effect. It seems to me that that is a decision of this Court that a bill of sale will be void unless all the blanks which are included in the statutory form are filled up. If that is the correct view of the meaning of the provision that a bill of sale must be in accordance with the form, it seems to me to be a fortiori that nothing can be omitted which the Legislature has included as part of the form if the bill of sale is to be "in accordance with the form." I am of opinion therefore that this bill of sale is void because it omits a passage in the form which the Legislature has inserted, and which it must be presumed

to have inserted because it considered its insertion necessary and material.

It is said on behalf of the claimants that if the consideration is not exactly the consideration indicated in the form, there must be some alteration in the form, and it is merely a necessary alteration to omit any reference to a receipt of the money where the payment of the money is, not by the grantee to the grantor direct, but by the grantee to a third person. I am unable to accept that contention. It seems to me that it is just as necessary and just as essential to insert an acknowledgment of the receipt of a consideration where the payment is to a third person, as it is where the payment is to the grantor. Applying either the test indicated by Bowen L.J. or that indicated by Lord Macnaghten this bill of sale is not in accordance with the form in the Act. Mr. Clayton has pointed out the importance that has always been attached to the insertion in a deed of a receipt for the consideration money, and that before the Conveyancing Act, 1881, great importance was attached to a receipt indorsed on the deed. In *Bickerton* v. *Walker* (1) Fry L.J. pointed that out. He said: "The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand." Since the Conveyancing Act, 1881, it is no

(1) 31 Ch. D. 159.

C. A. 1920

BURCHELL v. THOMPSON.

Bankes L.J.

longer necessary to indorse the receipt on the deed, but the insertion in the body of the deed of the receipt for the consideration is of very material importance, not as between the immediate parties to the deed, but as between one of the original parties and a subsequent purchaser; and that provision in the Conveyancing Act applies to a bill of sale. According to the test laid down by Bowen L.J., the omission of the receipt for the consideration money has the result that the instrument as drawn will, in virtue of that omission, have a legal effect which falls short of that which would result from the statutory form. In my opinion, therefore, if I have to deal with this case by applying Bowen L.J.'s test, the result is that this bill of sale must be held to be void as not being in accordance with the statutory form.

Lush J. said that the insertion of this receipt "would add nothing to the efficacy of the deed if that statement were inserted. It detracts not from its validity if the statement is omitted. Inasmuch as all that is required in regard to the statement of the consideration for a bill of sale is that it be truly stated" it is sufficient to state that the money is paid by the grantee to the third party at the request of the grantor. The learned judge's attention does not seem to have been directed by counsel for the execution creditor to the provisions of the Conveyancing Act, 1881, and I think that he wrongly confined his attention to the effect of the receipt clause upon the immediate parties to the deed. I think that the appeal succeeds upon the first ground.

I think that it also succeeds upon the second ground. The object of the provision in the Bill of Sale Act, 1878, requiring the bill of sale to be registered and a true copy to be filed is that a person who gives a bill of sale shall not, by remaining in apparent enjoyment of the property comprised therein, be able to conceal his true position. The Legislature has accordingly provided that a bill of sale shall be registered, a true copy thereof being filed, so that persons may have an opportunity, by search, of ascertaining the true position of a person to whom they may be intending to give credit. In this connection "a true copy" must mean that every

material provision which is contained in the original must be contained in the copy. It may happen that some material provision is omitted in one part of the copy, but something in some other part will supply that omission, so that, reading the document as a whole, the omission becomes immaterial. Can that be said here? What has been omitted is the words "per annum" in the statement of the interest. The interest as stated in the bill of sale is 55 per cent. per annum. It was essential to include the words "per annum" in the bill of sale, because the form in terms provides that if the interest is at a rate per annum that fact must be stated. It was stated in the original; it is omitted in the copy. How can it be said that such an omission is immaterial? There is nothing, so far as I can see, in the other provisions of the copy which would enable any person, reading the copy, to be certain what the rate of interest provided in the original was; and I feel unable to jump to the conclusion that because the interest is stated to be at the rate of 55 per cent. it must necessarily be per annum. I do not think that a copy, which leaves the reader in the position that he must guess what the original contains, can in any proper sense of the word be called "a true copy" of that original.

For these reasons, in my opinion, the appeal succeeds, and the bill of sale must be held to be void on both grounds.

SCRUTTON L.J. I agree, and as we are differing from the judgment of the Court below I will express my opinion in my own words.

The question in this case is whether a particular bill of sale is void. The first point taken against the bill of sale is that it is not in accordance with the form in the schedule to the Bills of Sale Act, 1882. The form in the schedule says: "In consideration of the sum of £ now paid to A. B. by C. D. the receipt of which the said A. B. hereby acknowledges." The bill of sale in this case, in which the consideration is paid not to the borrower but to another person by the borrower's direction, omits any receipt clause. Does that invalidate the bill of sale? The bill of sale is to

C. A. 1920

BURCHELL v. THOMPSON.

Scrutton L.J.

be void unless made in accordance with the form in the schedule; and, without saying that it is exhaustive, I am disposed to adopt the statement of Lord Macnaghten in the case of *Thomas* v. *Kelly* (1): "Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form." Part of the form is characteristic if its absence alters the legal effect of the form. That is dealt with in the judgment of the Court of Appeal in *Ex parte Stanford.* (2) Again, part of the form is characteristic if it has a material effect, as for instance, the direction to "add witness's name, address, and description," where the legal effect of the form is not altered, but a means is given of ascertaining whether in fact the bill of sale was properly executed. Is the receipt clause a characteristic part of the form, or may it be omitted or inserted at the pleasure of the grantor? The Courts of law and equity differed as to the effect of recitals or receipts included in a deed. Courts of law were disposed to treat them as estoppels; Courts of equity were disposed to allow their truth to be investigated; but much greater importance was attached by Courts of equity to receipts indorsed on the deed. Part of the reason is given in the passage which my Lord has read from the judgment of Fry L.J. in *Bickerton* v. *Walker.* (3) There is a similar explanation given by Amphlett B., who was also familiar with the practice of Courts of equity, in *Morgan's Patent Anchor Co.* v. *Morgan* (4): "It not unfrequently happens, particularly with regard to an acknowledgment of the receipt of money in the body of the deed, that the deed is signed before the money is handed over, and in all such cases the Court of equity has considered, in consequence of that almost universal practice, that the receipt indorsed on the deed is of much greater importance as regards the question of fact whether the money has been paid or not, than the statement in the recital in the body of the deed."

So the law of conveyancing stood down to 1881, when

(1) 13 App. Cas. 520.
(2) 17 Q. B. D. 259.
(3) 31 Ch. D. 159.
(4) (1876) 35 L. T. 811, 813.

the Conveyancing Act, 1881, made an alteration. Sect. 54, sub-s. 1, provides: "A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed"; and s. 55, sub-s. 1, provides: "A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, ... be sufficient evidence of the payment or giving of the whole amount thereof." In *Bateman* v. *Hunt* (1) the Court of Appeal acted on that provision in the Conveyancing Act, and pointed out the importance of the receipt in the deed. It appears to follow that the presence or absence of a receipt in the deed may have this important legal result, that a subsequent purchaser from a mortgagee under the power of sale given by a bill of sale will get much more protection if there is a receipt in the deed than he will if there is only the statement "now paid." If that is so, then the presence or absence of the receipt clause makes a difference in the legal effect of the instrument; and when that is shown, and one finds the receipt part of the form, it appears to me that it is, in Lord Macnaghten's language, a characteristic part of the form which must be followed. If it is not followed the bill of sale is void. It is easy to modify the receipt clause without in any way altering its effect in a case where the consideration is paid to a third person and not to the grantor of the bill of sale; and inasmuch as the receipt clause has been omitted in this case, it seems to me that a characteristic part of the form has been omitted, and that the bill of sale is not in accordance with the statutory form, and is for that reason void.

I should add that apparently the provisions of the Conveyancing Act, 1881, were not pressed upon the attention of the Divisional Court in support of the contention of the execution creditor, and that consequently the ground on which we are deciding this point was not brought to their attention.

(1) [1904] 2 K. B. 530.

C. A. 1920

BURCHELL v. THOMPSON.

Scrutton L.J.

There is another matter in which the bill of sale is attacked. By s. 10, sub-s. 2, of the Bills of Sale Act, 1878, a true copy of the bill must be filed with the Registrar, the object being that if a person borrows money on this class of security, persons who may think of dealing with him shall have an opportunity of seeing the terms on which he is borrowing money, and that the security he has given is valid. There is therefore a provision that a true copy must be filed, otherwise the bill of sale is void. A true copy, as has been said, does not mean an exact copy; for instance, mere mis-spellings, mere failure to fill up blanks which can be filled up from other parts of the deed—matters which do not in any way affect the purpose for which the true copy is required —will not prevent the document registered from being a "true copy" within the meaning of the Act. But in this case the statutory form, providing for "payment of the sum of £ and interest thereon at the rate of per cent. per annum (or whatever else may be the rate)," is not followed. The printed form of bill of sale provided originally for interest "at the rate of one shilling in the pound per month." The bill of sale as executed provides for interest "at the rate of fifty-five per cent. per annum"; the copy leaves out "per annum" and reads "at the rate of fifty-five per cent." One cannot go through the world without knowing that one of the means of carrying on business by money-lenders is not to put too clearly before the eyes of the borrower the exact rate of interest which they expect him to pay, and that is sometimes done by the device of saying that they lend money at 5 per cent., omitting the period for which the 5 per cent. is to be paid. The borrower, who comes expecting to get money at 5 per cent. per annum, finds that that is not the view of the moneylender; he means 5 per cent. for a very much shorter period. The Courts therefore have taken the view that it is of great importance that the statutory provision should be strictly complied with in the matter of interest. I take one case as an example—*Myers* v. *Elliott* (1)—where Lopes L.J., after

(1) 16 Q. B. D. 526, 531.

reading the direction as to interest in the statutory form, said "meaning thereby, as I understand it, that the bill of sale is to specify the percentage per annum, or per month, or whatever the rate may be . . . . I believe that the intention was that the clearest possible information should be given to the borrower as to the rate of interest which he was paying." It appears to me to follow that, if in the original bill of sale in this case the interest had been stated as "at the rate of fifty-five per cent.," without saying whether that 55 per cent. was per annum, or for any shorter or longer period, under the judgment of the Court of Appeal in *Myers* v. *Elliott* (1) the bill of sale would have been void. The original bill of sale has not that defect, but the copy has; and anyone seeing the copy, and assuming that the original was like the copy, would be misled as to what the provisions of the original bill of sale were in a matter which is material to the effect of the bill of sale. A similar decision was given by the Divisional Court in *Blankenstein* v. *Robertson* (2), where the importance of *Myers* v. *Elliott* (1) as to stating the rate of interest was pointed out. It appears to me that on this ground also the bill of sale can be successfully attacked.

For these reasons I feel myself unable to agree with the decision in the Divisional Court, and I think that the judgment of the county court judge should be restored.

ATKIN L.J. I agree. With reference to the first question, whether this bill of sale is in accordance with the statutory form, I think that the provisions of ss. 55 and 57 and the forms in the fourth schedule to the Conveyancing Act, 1881, are decisive on the point; and it is unfortunate that these sections do not seem to have been relied upon by the execution creditor in the Divisional Court. The form in the Bills of Sale Act, 1882, provides for what I may call a statutory receipt in the body of the bill of sale where the consideration is paid to the grantor by the grantee, and it appears to me that in a bill of sale in that simple form

(1) 16 Q. B. D. 526, 531. (2) 24 Q. B. D. 543.

C. A. 1920

BURCHELL v. THOMPSON.

Atkin L.J.

the receipt, which is expressed in the form "the receipt of which the said A. B. hereby acknowledges," gives to the bill of sale the effect produced by s. 55 of the Conveyancing Act, and protects a subsequent purchaser. It is not necessary to decide whether *Ex parte Stanford* (1) exhaustively states the considerations which determine whether or not a bill of sale is in accordance with the form. I am inclined to think that the effect of that decision has been extended by the decision of the House of Lords in *Thomas* v. *Kelly*. (2) If the test in *Ex parte Stanford* (1) as to departure from the form is applied, this case falls within it. When the Court is dealing with the question whether or not the bill of sale has a greater or less legal effect than the form, it seems to me to be immaterial to consider whether the difference in the legal effect is in favour of the grantor or of the grantee. If there is in fact a difference in the legal effect, the bill of sale is not in accordance with the form. In this case, I think, the omission of the statutory receipt would be to the detriment of the grantee, but that, to my mind, makes no difference.

The argument put before us on behalf of the claimants is this: Assume that the contention of the execution creditor is correct in a case where there is one consideration presently paid by the grantee to the grantor, still it does not apply where the consideration is something different from that; and reliance is placed on the words in the form, "in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges (or whatever else the consideration may be)." It is said that, where the consideration is something other than the payment of one sum of money at the time by the grantee to the grantor, the form does not require the introduction of the statutory receipt. I cannot approve of that. I think that the statutory receipt is characteristic of the form, and its omission diminishes the legal effect of the form. In this connection it is not unimportant to remember that, in the bundle of sections in the Conveyancing Act, 1881,

(1) 17 Q. B. D. 259. (2) 13 App. Cas. 506.

which is headed "Construction and effect of deeds and other instruments," and which contains s. 55, s. 57 is included, which provides: "Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient." Among the forms in the fourth schedule there is one headed "Conveyance on Sale," made by a mortgagee and a mortgagor, where the purchaser is paying off the mortgage. The indenture witnesseth "that in consideration of the sum of £ paid by the direction of A." (the mortgagor) "to B. and C." (the mortgagees) "and of the sum of £ paid to A. those two sums making together the total sum of £ paid by M. for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ B. and C. hereby acknowledge the receipt and of which total sum of £ A. hereby acknowledges the payment and receipt in manner before mentioned," etc. That is a statutory form of receipt where the payment is in fact made by the direction of the mortgagor to a third person, and it is given the statutory effect mentioned in s. 57. Even if the words "now paid" in themselves form a receipt, as to which I have considerable doubt, it is clear upon the authorities and upon the construction of the Act of 1881 that they are not the words referred to in the section, and would not of themselves give the statutory proof, and that thereby the bill of sale has lost some legal effect which it would have had if the proper words of receipt had been inserted.

Upon the question whether the copy filed is a true copy, I have some little doubt turning upon the precise words of this bill of sale. It appears to me however to be plain that it is not sufficient for a copy, to be a true copy, to state with complete accuracy in a summary form the effect of the stipulations contained in the original document. It is not merely a document that is to state the true legal effect of the original; it is to be a copy of the original. With a little doubt, because I am inclined to think that on the true

C. A. 1920

BURCHELL v. THOMPSON.

Atkin L.J.

construction of the terms of the document, "55 per cent." means "55 per cent. per annum," I come to the conclusion that as in the original the words are material they ought to have been in the copy; and I come to the conclusion upon the whole that this copy was not, within the meaning of the Act, a "true copy" of the original.

For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for claimants: *G. R. Cran.*

Solicitors for execution creditor: *Appleton & Co.*

W. F. B.

1919 *Oct.* 20, 23;

C. A. 1920 *Feb.* 3, 4.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

COLE *v.* KELLY.

[1918. C. 1648.]

Landlord and Tenant—Lease—Expiration of Term—New Quarterly Tenancy—Assignment of Reversion—Covenants to repair—"Covenant therein contained"—Right of Assignee of Reversion to sue for Breaches of Covenant—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 10, *sub-s.* 1.

By an indenture of lease dated February 24, 1913, the lessee of a house in London for a term of ten years (hereinafter called the lessor) demised the first, second, and third floors thereof, with the hall on the ground floor and the staircases and passages, to the defendant for five years from December 25, 1912, the lease reserving to the lessor and her employees a right to use the hall for the purpose of gaining access from the street to the shop and premises occupied by her. The lease contained covenants by the defendant that she would keep and yield up the premises in good and tenantable repair, that she would not make any alteration or addition to the premises without the consent of the lessor, that she would pay for the gas consumed in the premises including the hall, and that she would use the premises for carrying on occupations of a quiet and inoffensive nature only. The lessor covenanted that she would pay the rent and perform and observe the covenants in the lease under which she held, and would pay all rates,

taxes, and outgoings payable in respect of the demised premises. By an agreement between the administrators of the lessor who had died and the defendant contained in correspondence, it was arranged that on the expiration on December 25, 1917, of the defendant's lease she should as from that date continue to occupy the premises on a quarterly tenancy. On June 20, 1918, the defendant gave a quarter's notice to quit the premises on September 29, 1918. Before the expiration of that notice, by an indenture dated July 10, 1918, the administrators demised the premises to the plaintiff for the residue of the term created by the head lease less three days. The plaintiff sued the defendant for alleged breaches of the repairing covenants:—

Held, that the plaintiff was the assignee of the reversion expectant upon the determination of the defendant's tenancy; that the terms of the expired lease as to repairs were to be implied in the new agreement in writing for a quarterly tenancy; that those terms being implied in the written agreement were "therein contained" within the meaning of s. 10, sub-s. 1, of the Conveyancing Act, 1881; and that therefore the plaintiff was entitled to sue for breaches of the covenants to repair as contained in the agreement for the quarterly tenancy.

ACTION tried before Lush J. without a jury.

By an indenture of lease dated December 23, 1912, hereinafter referred to as the head lease, a piece of ground and the house thereon, No. 76, Baker Street, in the county of London, were demised by the landlord to Miss M. Mead from December 25, 1912, for ten and a quarter years less the last thirty days thereof.

By an indenture of assignment of the same date as the last-mentioned indenture these premises were assigned by Miss Mead to and became vested in Miss L. Hammond for the residue of the term granted by that indenture.

By an indenture of lease dated February 24, 1913, Miss L. Hammond (therein called the lessor) demised to Mrs. Kelly, the defendant (therein called the lessee), all the rooms constituting the first, second and third floors of the house together with the hall on the ground floor and the staircases and passages leading from the hall to these rooms, reserving to the lessor and her employees a right to use the hall for the purpose of gaining access from the street to the shop and premises occupied by the lessor and returning therefrom, for the term of five years from December 25, 1912, at the yearly rent of 165*l.* for the first and second years and 170*l.* for the remainder of the term, payable quarterly; and

C. A. 1919

COLE v. KELLY.

the lessee thereby covenanted (inter alia) that she would during the term thereby granted keep all the premises thereby demised and the fixtures, painting papering and decorations thereof in good and tenantable repair and condition, and would at the determination of the tenancy quietly yield up the premises with the fixtures (not being trade fixtures) which at the date of the lease were or at any time during the tenancy should be thereon in a good and tenantable state of repair and condition; provided that if the rent should be in arrear for 21 days, or in the event of any breach of any of the covenants and agreements on the part of the lessee therein contained the landlord might re-enter on the demised premises. The lessee also covenanted that she would not make any alteration or addition to the demised premises without the written consent of the lessor; and would pay for any necessary alterations of the gas piping and the fixing of a separate meter for the demised premises, and would pay for all gas consumed in respect of the premises including the lighting of the hall on the ground floor; and would not carry on upon the premises any offensive, noisy or dangerous trade, business, manufacture, or occupation, but would use the same for carrying on occupations of a quiet and inoffensive nature only. The lessor covenanted that she would during the term pay the rent and perform and observe the covenants reserved by and contained in the indenture of lease under which the premises thereby demised were held so far as they affected the premises; and also would during the term pay all existing and future rates, taxes and outgoings for the time being payable in respect of the demised premises.

On October 29, 1914, Miss L. Hammond died intestate.

Towards the end of the term created by the last-mentioned indenture Mr. R. G. Hammond, one of the administrators of Miss L. Hammond acting as their representative, and the defendant who up to that time had only been required to pay a rent of 150*l.*, carried on a correspondence as to whether and if so on what terms the defendant should continue her tenancy after the expiration of the term. The

correspondence so far as material was as follows: On November 7, 1917, Mr. Hammond wrote to the defendant: "I should be prepared to continue to let you the upper part now occupied by you at the present rent you now pay of 150*l.* per annum provided you entered into a lease to take them for five years from Christmas next." On November 9 the defendant replied: "I regret to say the terms as suggested by you are quite out of the question, as under no consideration whatever will I sign an agreement for five years. Without prejudice I offer you for the whole of the upper part as at present occupied by me 140*l.* per annum on a yearly tenancy." On November 14 Mr. Hammond wrote: "I have now discussed the matter with my co-administrator and we are prepared to let you remain as tenant of the upper part as now occupied by you on a quarterly tenancy subject to a quarter's notice on either side from Christmas next at the rent of 150*l.* per annum. If you accept these terms please write and confirm them." On November 19 the defendant replied: "I am still considering your proposal. . . . . I presume the quarterly notice on either side is to be given on the usual quarter days to expire the following quarter day. Perhaps you will kindly inform me if this is so." On November 26 Mr. Hammond wrote: ". . . . You are quite right in assuming the quarterly notice would be from quarter day. . . . . I shall be glad to hear as soon as you have decided." On November 28 the defendant replied: "I now wish to say that I shall be quite willing to agree to a quarterly tenancy of the premises (upper part) as above on the terms stated by you, viz., a quarter's notice to be given by either side on the usual quarter day." On November 29 Mr. Hammond wrote: "I am in receipt of your letter of 28th, and note that you wish to continue the tenancy of 76, Baker Street, on the terms stated by me, viz., 150*l.* per annum on a quarterly tenancy subject to a quarter's notice from a quarter day."

An agreement in writing was thus made between the administrators and the defendant that on the expiration on December 25, 1917, of the term created by the indenture of February 24, 1913, the defendant should from that date

C. A. 1919

COLE v. KELLY.

continue to occupy the floors of the house then occupied by her on a quarterly tenancy subject to a quarter's notice given on one of the usual quarter days.

On the expiration of her lease on December 25, 1917, the defendant accordingly continued in occupation of the premises under the new agreement.

By letter dated June 20, 1918, the defendant gave the administrators notice of her intention to quit the premises on September 29, 1918.

By an indenture dated July 10, 1918, and made between the administrators, therein called the lessors, and Mrs. Cole, the plaintiff, therein called the lessee, which recited the above-mentioned indentures, and that the lessors had agreed with the lessee for the sale to her of the premises comprised in the head lease, and that the landlord of the premises demised by the head lease had refused to consent to an assignment thereof but had given his consent in writing to the underlease of these premises by the reciting indenture made, and that it had been agreed that the sale thereof to the lessee should be effectuated by the grant of that underlease, it was witnessed that in pursuance of the said agreement, and in consideration of a sum then paid by the lessee to them, the lessors thereby demised to the lessee all and singular the premises comprised in or granted or demised by the head lease to hold for the residue then to come of the term of ten and a quarter years less thirty days, except the last three days thereof, subject to but with the benefit of the indenture of underlease dated February 24, 1913, the lessee paying therefor to the lessors during the term the same or the like rents as were by the head lease reserved or made payable in respect of the premises, such rents to be paid upon or at the same or like days or times and in the manner thereby provided. And the lessee covenanted with the lessors that she would during the term pay to the lessors the said rents; and also would during the term perform and observe all the lessors' covenants in the head lease and would keep indemnified the lessors against all actions for any breach of any of the said covenants. And the lessors

covenanted with the lessee that they would pay the rents reserved by the head lease, and would not at any time do or suffer any act or thing whereby the head lease might become void or liable to forfeiture.

On September 29, 1918, the defendant gave up possession of the premises occupied by her.

On October 8, 1918, the plaintiff brought the present action against the defendant for damages for breach of covenant to repair the premises in question contained in the indenture of February 24, 1913.

The plaintiff in her statement of claim alleged (inter alia) (para. 4) that the tenancy created by the indenture of February 24, 1913, between the administrators and the defendant determined on December 25, 1917, but the defendant, with the consent of the administrators, held over the premises as quarterly tenant on the terms and conditions of that indenture so far as was material in the action until September 29, 1918; and that an agreement to that effect was contained in the above-mentioned letters; (para. 5) that by indenture dated July 10, 1918, and made between the administrators and the plaintiff the whole of the estate and interest of the administrators in the messuage and hereditaments, No. 76, Baker Street, aforesaid, of which the premises demised to the defendant formed part, less the last three days thereof, were conveyed and demised by the administrators to the plaintiff for the consideration therein mentioned subject to but with the benefit of the indenture of February 24, 1913; and (para. 6) that the premises held by the defendant were both during her said term and the holding over out of such repair as was required by the covenant and were yielded up out of such repair when the defendant relinquished possession thereof.

The defendant in her defence stated (para. 1) that she denied that the premises were either during the term of the said indenture or at any time during her possession thereafter out of good and tenantable repair and condition or were yielded up out of such repair and condition; (para. 2) that she denied that she with the consent of the administrators

C. A. 1919

COLE v. KELLY.

held over the premises or any part thereof as alleged in para. 4 of the statement of claim or at all; and that on and after December 25, 1917, on the expiration of the term of the said indenture, the defendant occupied the premises on a quarterly tenancy free from all covenants or obligations to repair or keep repaired the said premises; and that the agreement whereby the defendant occupied the said premises on and after December 25, 1917, on a quarterly tenancy was contained in the above-mentioned letters; and (para. 3) that she did not admit the other allegations in the statement of claim.

It appeared in evidence that the defendant had paid her last quarter's rent to the plaintiff, but that she had done so in the mistaken belief that there had been a regular and complete assignment of the head lease by the administrators to the plaintiff. Lush J. therefore refused to find that the defendant by so paying that rent had attorned tenant to the plaintiff.

The plaintiff brought evidence with a view to showing that breaches had been committed of the defendant's covenants to repair, and the defendant brought evidence to show that there had been no breaches of these covenants.

Compston K.C. and *Foà* for the plaintiff. The defendant is liable to the plaintiff for any failure on her part to keep and deliver up the premises in question in repair. By the indenture of lease of February 24, 1913, Miss Hammond, who was the lessee of the house for a term, demised the premises to the defendant for five years, and the defendant entered into covenants to keep and yield up the premises in repair. By the agreement in writing contained in the letters which passed between the administrators of Miss Hammond and the defendant, the latter on the expiration of her lease held over on a quarterly tenancy in which the terms of the lease so far as applicable, including the repairing covenants, were implied by law. By the indenture of July 10, 1918, which was made during the quarterly tenancy on which the defendant held over, the administrators demised the

house to the plaintiff in præsenti for the residue of their own term except the last three days thereof with the benefit of the indenture of February 24, 1913, which had contained the defendant's covenants to repair. By the last-mentioned indenture the plaintiff became in effect the assignee of the reversion expectant on the determination of the defendant's tenancy with the benefit of the defendant's obligations to repair, and she is entitled to sue the defendant for breaches of the obligation to repair whether committed since or before the date of the plaintiff's lease.

Disturnal K.C. and *Slesser* for the defendant. The defendant is under no obligation to the plaintiff in respect of the covenants to keep and deliver up the premises in repair.

The plaintiff was not the assignee of the reversion expectant on the determination of the defendant's tenancy. She was not the assignee of that reversion by operation of law. Neither was she the assignee of it by deed. The administrators by the indenture of July 10, 1918, did not assign the reversion to the plaintiff, but retained it themselves and merely granted to the plaintiff a lease for a shorter term carved out of their reversion. The plaintiff and the defendant are both simply lessees of the administrators, and there is as between them no privity of estate or relationship of landlord and tenant.

Assuming that the plaintiff by her indenture of lease is an assignee of the reversion, it does not follow that she can sue the defendant upon the latter's covenants to repair. As she is not an assignee of the reversion by operation of law she cannot sue the defendant at common law for breaches of the express covenants in the latter's lease. Being an assignee of the reversion by deed she can only sue the defendant for breaches of such covenants by statute—either the statute 32 Hen. 8, c. 34 (1), or the Conveyancing Act,

(1) 32 Hen. 8, c. 34, s. 1: "..... all ..... persons being grantees or assignees to or by our said sovereign lord the King, or to or by any other person or persons than the King's highness, and the heirs, executors, successors and assigns of every of them, shall and may have and enjoy like advantage against the lessees, their executors, administrators and

C. A. 1919

COLE v. KELLY.

1881, s. 10, sub-s. 1. (1) The plaintiff cannot sue the defendant under the statute of Henry 8 upon the covenants to repair which were contained in her lease, because that statute only entitles a reversioner to sue upon a covenant contained and expressed in an existing instrument under seal, and here the defendant's lease under seal which contained these covenants to repair had come to an end before the reversion was assigned to the plaintiff. The plaintiff cannot sue the defendant under the Conveyancing Act, 1881, s. 10, upon the covenants to repair in her lease. Under that enactment an assignee of the reversion can only sue upon a covenant which is contained in an instrument in writing: *Blane* v. *Francis*. (2) Here the defendant's repairing covenants were not expressly "contained" in the agreement in writing between the administrators and the defendant upon which the latter held over. Neither were these covenants impliedly "contained" in that agreement. All the terms of the new

assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the Act made at the first session of this present parliament, if no such grant by letters patent had been made by his Highness."

(1) Conveyancing Act, 1881 (44 & 45 Vict. c. 41):—Sect. 10: "(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

(2) [1917] 1 K. B. 252.

quarterly tenancy were contained in the letters. If however the covenant to repair is to be implied in the written agreement it is not "contained" in it. The implication does not arise as an implication of law from the language of the document itself, but from something outside the document—namely, the surrounding circumstances. In such a case it is a question of fact whether the term is to be implied, and if implied it is implied from something outside the document and is not " contained " in the document. Where a tenant holds over on the expiration of a lease and the facts do not exclude the presumption, the law no doubt determines that he impliedly holds subject to the covenants in the lease in so far as these are applicable to the new tenancy : *Wedd* v. *Porter*. (1) In the present case, however, the terms of the written agreement under which the defendant held over did exclude any such presumption. Moreover the covenants in question were not applicable to the new tenancy. These repairing covenants would have been appropriate in the lease of a house, but they were not appropriate in the defendant's lease, which was not of a house, but only of rooms in a house, and they were not therefore applicable to the new tenancy of these premises on which she held over, and ought not to be implied in that tenancy. If any other repairing covenants appropriate to the defendant's premises were implied in her lease, these being merely implied covenants in the lease would not be implied by law in the agreement on which she held over : *Johnson* v. *St. Peter, Hereford*. (2) The result is that the covenants to repair in the lease are not to be implied in the new written agreement for the quarterly tenancy; and even if they are they are not " contained " in it within the meaning of s. 10 of the Conveyancing Act, 1881. The plaintiff therefore is not entitled to enforce these covenants against the defendant. The case of *Horn* v. *Beard* (3) is no authority to the contrary. There the action was for rent which issues out of the land and which the tenant is

(1) [1916] 2 K. B. 91. (2) (1836) 4 Ad. & E. 520.
(3) [1912] 3 K. B. 181.

C. A. 1919

COLE v. KELLY.

under an obligation to pay to the assignee of the reversion apart altogether from covenant.

Assuming that the plaintiff by virtue of her lease obtained an assignment of the reversion and that she has a right to enforce the defendant's covenants, she can only sue for breaches of these covenants which were committed after the date of the assignment and not for breaches which were committed before that date : *Johnson* v. *St. Peter, Hereford* (1) and see *Wedd* v. *Porter*. (2) The right of action for damages for past breaches was not assigned to the plaintiff by her lease, but remained vested in the administrators.

Foà in reply. The plaintiff having obtained a lease for a term to commence in præsenti subject to the existing quarterly tenancy upon which the defendant was holding over after the expiration of her original lease, became the assignee of the reversion expectant upon the determination of the defendant's tenancy : see *Throckmerton* v. *Tracy*. (3)

[LUSH J. In *Manchester Brewery* v. *Coombs* (4) it seems to have been laid down that by virtue of s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), a covenant can, after an absolute assignment thereof in writing and notice given to the covenantor, be sued upon by the assignee.]

The plaintiff as assignee of the reversion became entitled under the Conveyancing Act, 1881, s. 10, to sue the defendant upon such covenants in her agreement of tenancy as were binding upon her. That section provides that the benefit of every covenant " contained " in a lease and on the lessee's part to be performed shall go with the reversionary estate in the land immediately expectant upon the term ; and it has been laid down that the section only applies to leases in writing : *Blane* v. *Francis*. (5) It is to be observed, however, that that case does not say that a covenant in order to be contained in the written document must itself be expressed in it in writing. Here the defendant held under an agreement in writing—namely, the agreement formed by

(1) (1836) 4 Ad. & E. 520.
(2) [1916] 2 K. B. 91.
(3) (1555) Plowd. 145.
(4) [1901] 2 Ch. 608.
(5) [1917] 1 K. B. 252.

the letters for the quarterly tenancy on which she held over. The repairing covenants in question were "contained" in that agreement within the meaning of the section. Where a tenant holds over and the facts do not exclude the inference, the law presumes that he impliedly holds subject to the covenants in the expired lease which are applicable to the new tenancy: *Wedd* v. *Porter* (1) and per Cozens-Hardy M.R. in *Morgan* v. *Harrison*. (2) Here the facts so far from excluding that inference tend rather to confirm it, inasmuch as in one of the letters forming the quarterly agreement the administrators state that they are prepared to let the defendant "remain as tenant," thus clearly suggesting a new tenancy on the same terms, or even a prolongation of the defendant's then existing lease. The defendant's repairing covenants in the original lease were applicable to the new quarterly tenancy of the premises on which she held over. They were suitable covenants in regard to the premises comprised in the defendant's original lease notwithstanding that these did not constitute an entire house, and they are equally suitable in regard to the premises when held under a quarterly tenancy. They are necessarily implied in the new written agreement of tenancy. The result is that the plaintiff is entitled to enforce these covenants against the defendant.

As to the covenant to keep the premises in repair, the plaintiff can sue the defendant not only for breaches of that covenant which may have been committed after the date of the assignment to her of the reversion, but also for breaches of that covenant which may have occurred before that date, inasmuch as breaches of that covenant are continuous breaches.

Under the defendant's original lease the landlord had a right of re-entry for breach of covenant; and the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 2, sub-s. 1, provides that s. 10 of the Act of 1881 shall apply to the benefit of every condition of re-entry or forfeiture for a breach of any covenant contained in a lease, so as to enable the same to be enforced and taken advantage of by the assignee of the reversion.

(1) [1916] 2 K. B. 91. (2) [1907] 2 Ch. 137, 143.

C. A. 1919

COLE v. KELLY.

If the defendant's tenancy had still existed the plaintiff would therefore have been entitled to re-enter for breaches of these covenants.

Even apart from s. 10 of the Conveyancing Act, 1881, the plaintiff is entitled to sue the defendant for breaches of these covenants: *Horn* v. *Beard*. (1)

LUSH J. This action is brought by the plaintiff against the defendant for damages for alleged breaches of covenants to keep in repair and to yield up in repair certain premises of which the defendant was in occupation.

The facts are as follow: By an indenture dated February 24, 1913, Miss Hammond, who was the tenant of a house in Baker Street, London, demised certain rooms in that house to the defendant for a term of five years from December 25, 1912, at a yearly rent of 165*l.* for the first two years of the term and 170*l.* for the remaining years. The defendant's lease was to come to an end on December 25, 1917. Shortly before that date, in November, 1917, correspondence took place between the administrators of Miss Hammond, who had died, and the defendant, who had never been called upon for more than 150*l.* a year as rent, with reference to the questions whether the defendant should leave the premises or stay on, and if she stayed on whether she should do so at a less rent than she had hitherto paid, and whether she should do so for a fixed term or subject to notice to quit. The result of the correspondence was that on November 28, 1917, three weeks before her lease came to an end, the defendant wrote to the administrators of Miss Hammond in reference to an offer which had been made by them, that she would agree to a quarterly tenancy subject to a quarter's notice to quit by either side, the rent being presumably agreed by the parties at 150*l.* per annum. The defendant's lease came to an end on December 25, 1917, but in accordance with the new arrangement the defendant continued in occupation of the rooms. On June 20, 1918, however, she gave a quarter's notice to

(1) [1912] 3 K. B. 181.

give up possession on September 29, 1918. After that notice had been given but before it had expired, by an indenture dated July 10, 1918, the administrators granted to the plaintiff a lease of the house in which these rooms were situated on certain terms. The administrators, if they had been permitted to do so by the superior landlord, would have assigned their own lease to the plaintiff, and she would then undoubtedly have acquired the reversion of the defendant's tenancy. The superior landlord would not, however, consent to that, and the transaction accordingly took this form. The administrators demised the whole house to the plaintiff for the residue of the term on which they held it from the superior landlord, less the last three days thereof, subject to but with the benefit of the underlease to the defendant, which had ended in the preceding December. Literally construed the indenture by which the transaction was carried out created an underlease subject to and with the benefit of the underlease to the defendant, which had come to an end. It did not do that which in terms it purported to do, but it created a new lease between the administrators and the plaintiff subject to and with the benefit of the new tenancy which had been created by correspondence between the administrators and the defendant.

In the circumstances which I have stated the question is whether the plaintiff is entitled in law to sue the defendant for damages for breach of the covenants to repair which were contained in the lease of February 24, 1913, by which Miss Hammond demised the rooms to the defendant for five years.

In the first place it is necessary to consider whether the plaintiff was an assignee of the reversion expectant upon the determination of the defendant's tenancy. I am of opinion that she was. It is true that there had not been a complete assignment of the reversion by the administrators to the plaintiff. There had not been such an assignment of the reversion as to alter the relation between the superior landlord and the administrators. There had, however, been the creation of a fresh lease in favour of the plaintiff, subject

C. A. 1919

COLE v. KELLY.

Lush J.

to but with the benefit of the agreement of tenancy then existing between the administrators and the defendant. When the plaintiff obtained the grant of this lease, which would continue till 1923, the defendant had already given notice to quit, and her term was in the circumstances a term which would expire on September 29, 1918. It is thus evident that the plaintiff obtained a fresh lease for a term much longer than the unexpired residue of the defendant's tenancy. Where a new lease is granted in præsenti subject to an earlier lease for a shorter term the lessee under the new lease is entitled during the continuance of the earlier lease to the immediate reversion expectant on the determination of that lease. That point was decided in *Horn* v. *Beard*. (1) The plaintiff was therefore assignee of the reversion to the defendant's tenancy.

It does not, however, follow that the plaintiff is entitled to sue the defendant in this action. There was no privity of estate between the plaintiff and the defendant. The plaintiff was not entitled to the reversion by operation of law as she would have been if she had been the executrix or other representative in law of the landlord. She became entitled to it by deed—namely, the indenture of July 10, 1918, by which the lease of the house was granted to her subject to the tenancy of the defendant. That being so, the plaintiff cannot assert a right at common law to sue the defendant for breach of the latter's covenants as tenant. Her right to do so, if any, must be a statutory right either under the statute 32 Hen. 8, c. 34, s. 1, or under the Conveyancing Act, 1881, s. 10.

It is clear that she could not bring the action under the statute of Henry 8, because that statute only gives an assignee of the reversion a remedy by action for non-performance of a condition or covenant which is contained and expressed in a lease under seal, and here the defendant's lease under seal, in which the covenants in question were contained, had come to an end before the date of the lease by which she obtained the assignment of the reversion.

(1) [1912] 3 K. B. 181.

It is said, however, on behalf of the plaintiff, that she is entitled to enforce these covenants against the defendant under the Conveyancing Act, 1881, s. 10. [His Lordship read the section so far as material.] I am asked to say that it is to be inferred from the judgments of the Court of Appeal in *Blane* v. *Francis* (1) that where a written document which has the effect of creating a tenancy contains by implication although not in express terms a covenant to repair or any other obligation or agreement with reference to the demised premises, then the words of s. 10 are satisfied, and the assignee of the reversion can bring an action upon the covenant against the tenant. I cannot accept that view of the decision of the Court of Appeal in *Blane* v. *Francis*. (1) In that case the tenant of a house for a term under a lease by deed containing a covenant to repair held over without signing any further document, as yearly tenant upon the terms of the expired lease, the reversion being assigned after the expiration of the lease, and the Court of Appeal held that the assignee of the reversion was not entitled to sue the tenant for breaches of the covenant to repair in the expired lease, inasmuch as s. 10 only applies where the covenant or provision of which the assignee seeks to avail himself is contained in a written document. Swinfen Eady L.J. there said (2): "I am satisfied that the language of s. 10—which speaks of 'rent reserved by a lease' of 'every covenant or provision therein contained, having reference to the subject-matter thereof,' and of 'every condition of re-entry and other condition therein contained'—is not applicable to an agreement not in writing." A. T. Lawrence J. came to the same conclusion (3), and laid great stress on the consideration that the words of the section show that the covenant or provision, in order to be enforceable by the assignee of the reversion, must be contained in a document in writing. I think that there is here no such document in writing as was there deemed necessary. The letters between the administrators and the defendant by which the defendant's quarterly

(1) [1917] 1 K. B. 252. (2) Ibid. 257.
(3) Ibid. 258.

C. A. 1919

COLE v. KELLY.

Lush J.

tenancy was created make no reference to any obligation to repair on the part of the defendant. Consequently s. 10 of the Act of 1881 is not satisfied by the express terms of the demise. It is said however on behalf of the plaintiff that the covenants having been contained in the defendant's original lease are to be implied in the agreement by letters on which the defendant held over, and being implied in it are contained in it for the purposes of the section. The answer is that it is not true to say that these covenants are implied in that agreement. If the defendant when she held over on the expiration of her original lease continued to be liable to keep the premises in repair, it was because she agreed to keep them in repair either by an express verbal agreement or at least by an agreement which could be inferred from her acts and conduct. In every case it is a question of fact and not of law whether or not a tenant holding over has agreed to do so on the terms of the expired lease. In this case it may be that the defendant did agree verbally or by conduct to hold over on the terms of the expired lease, one of these terms being a covenant to keep the premises in repair. The effect would be the same as if she had verbally or by conduct agreed to keep the premises in repair. Suppose that the defendant had entered into an express verbal agreement with the administrators to keep the premises in repair. Her agreement of tenancy would then be partly written and partly verbal, written as regards its main provisions and verbal as regards her obligation to keep in repair; and no one could say that the obligation to keep in repair was either expressly or by implication contained in the written agreement formed by the letters. Similarly, if the defendant was bound by an agreement to be inferred from her conduct to keep the premises in repair, that agreement could not be said to be contained in the written agreement as one of its terms, but would be entirely outside of that agreement. I therefore come to the conclusion that s. 10, which requires that the covenant or provision sought to be enforced by the assignee of the reversion should be contained in a written agreement, has not in this instance been complied with.

The result is that the plaintiff as assignee of the reversion is not entitled to sue the defendant in this action either under the statute 32 Hen. 8, c. 34, or under s. 10 of the Conveyancing Act, 1881, or at all.

Judgment for defendant.

J. R.

The plaintiff appealed.

Compston K.C. and *Foà* for the plaintiff.

Disturnal K.C. and *Slesser* for the defendant. In addition to the cases referred to in the argument below the following cases were cited upon the question of an implied term in a contract: *Williams* v. *Burrell* (1); *Burges* v. *Wickham* (2); *Dougal* v. *McCarthy* (3); *Baynes* v. *Lloyd* (4); *Right* v. *Darby* (5); and upon the question of the plaintiff being entitled to sue as reversioner: *Turner* v. *Walsh*. (6) It was also argued that the clause in the lease of July 10, 1918—"subject to but with the benefit of the indenture of underlease dated February 24, 1913"—gave the plaintiff the right to sue for damages for breaches, if any, of the covenants to repair contained in that underlease. The Court expressed no opinion upon this point.

BANKES L.J. We have heard a very interesting argument which has travelled over a great deal of ground, but the point to be decided is an extremely short one.

In 1912 Miss Hammond became the assignee of the lease of a house in Baker Street which expired in 1923. In February, 1913, she let a portion of the house—namely, the three upper floors and the hall and passages—to the defendant for a term of five years expiring on December 25, 1917. In 1914 Miss Hammond died intestate. In November, 1917, shortly before the defendant's lease expired, she entered into

(1) (1845) 1 C. B. 402, 431–433.
(2) (1863) 3 B. & S. 669, 685, 696, 697.
(3) [1893] 1 Q. B. 736, 742.
(4) [1895] 1 Q. B. 820, 823.
(5) (1786) 1 T. R. 159, 162.
(6) [1909] 2 K. B. 484.

C. A. 1920

COLE v. KELLY.

Bankes L.J.

correspondence with one of the two legal personal representatives of Miss Hammond with reference to the terms upon which she might continue in occupation of the premises, and it was agreed that she should remain on as tenant, one of the terms being that either party might give a quarter's notice to terminate the tenancy. In June, 1918, the defendant gave to Miss Hammond's legal personal representatives notice that she intended to quit at Michaelmas. Before Michaelmas the legal personal representatives by deed underlet the whole house to the plaintiff for the residue of their term less three days. It is said that at the time when the defendant's lease expired on December 25, 1917, and at the time when the defendant went out of occupation at Michaelmas, 1918, the premises which she occupied were out of repair, and the plaintiff seeks to recover from the defendant damages for breaches of covenant in not having kept them and delivered them up in repair. The defendant contends that she is under no liability to the plaintiff even if there were breaches on her part of her covenant to repair. Lush J. decided in the defendant's favour on the ground that the plaintiff was only entitled to sue the defendant by virtue of s. 10 of the Conveyancing Act, 1881, and the case was not brought within that section.

The first point is whether the plaintiff is the owner of the reversion and as such entitled to sue for breaches of covenant. As Lush J. pointed out this case is not distinguishable in its facts from *Horn* v. *Beard* (1), and as the plaintiff was the underlessee of the premises under the lease of July 10, 1918, for a term which was to continue longer than the term which the defendant had, the plaintiff was entitled to the reversion. It also appears clear from s. 10 of the Conveyancing Act, 1881, that if the case comes within the section the plaintiff can sue as being "entitled to the income of the land leased." Therefore in the learned judge's view, with which I agree, the plaintiff has established her position of reversioner and has a right to sue if the case comes within s. 10. [The Lord Justice read s. 10.] The question therefore is whether

(1) [1912] 3 K. B. 181.

or not the covenants to repair and to deliver up in repair are covenants contained in the defendant's lease on her part to be observed or performed. In the first place, is the agreement contained in the letters one for a continuance of the tenancy upon the terms of the old lease except in so far as those terms are expressly varied by the new agreement or are inconsistent with the tenancy so created ? The learned judge came to the conclusion that the terms of the old lease, so far as they related to keeping and delivering up the premises in repair, were included in the new agreement, and I agree with him. This case has been spoken of as one where the defendant held over after the expiration of her lease. In my opinion the expression " holding over " is not properly applicable to a case like the present where terms have been arranged under which the tenant, after the expiration of her lease, continues in occupation of the premises. The distinction between a continuance in occupation on new terms agreed upon and a holding over where no new terms are agreed upon and the tenant remains in occupation with the consent of the landlord is pointed out by Lopes L.J. in *Dougal* v. *McCarthy* (1) where he says : " I think this case is governed by what Lord Mansfield said in *Right* v. *Darby* (2)—viz., ' If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract.' I will deal first with the case where there is merely a holding over by the tenant after the expiration of a tenancy for a year by consent of both parties, and nothing is said in reference to any terms of tenancy either by the landlord or the tenant. I think the proper direction to a jury in such a case would be that, there being such holding over, and nothing being said by either party as to terms, it follows from such holding over by implication of law that there is to be a tenancy from year to year on the same terms as those of the lease which has expired, so far as they are not inconsistent with such a tenancy ; that they are bound, to use Lord Mansfield's words, to imply a renovation of the

(1) [1893] 1 Q. B. 736, 742. (2) 1 T. R. 159.

C. A. 1919

COLE v. KELLY.

Bankes L.J.

old agreement." That is where the implication is of a tenancy from year to year and is an implication of law. He goes on to deal with the second case: "I will now proceed to deal with the case where, after the expiration of the term, letters have passed or conversation has taken place between the parties, as in the present case. In such a state of things it will be a question for a jury whether there has been a consent by both parties to a continuance of the tenancy, and if so on what terms."

In the present case the letters indicated what the terms of the new tenancy were to be. It is an inference of fact what were the terms of the new tenancy. I agree with the learned judge that the terms of the old lease as to repairing and delivering up in repair were included in the new agreement. Those terms form part of the agreement because they are implied in it. We have had a discussion upon implied terms and *Wedd* v. *Porter* (1) has been referred to. In my view the authorities show that there may be at least three different classes of implied terms. A term may be implied from the relationship of the parties, as in the case of landlord and tenant of an agricultural holding, where the law implies certain terms as to cultivation of the land and keeping the premises wind and water tight. A term may be implied from the use of certain words, as for instance "demise" in a lease. Again, there may be cases where a term is implied from the surrounding circumstances existing at the time the agreement is entered into. *Morgan* v. *Harrison* (2) is an illustration of this class. Cozens-Hardy M.R., speaking of the terms upon which the tenants continued in occupation of a coal mine, said (3): "Therefore the lessees were to be tenants at will with a right to get the coal and a right to exercise the way-leave. Both the mine and the way-leave are mentioned, and it seems to me irrational to suppose that the parties could have had any other meaning than that they should have the same mutual rights as before except in so far as you can find any stipulation in the old lease which

(1) [1916] 2 K. B. 91. (2) [1907] 2 Ch. 137.
(3) Ibid. 143.

is not applicable to a tenancy at will. Now there is ample authority that a tenant holding over after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year—a yearly tenant; and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy; and I can see no principle which can limit that position to a case where the tenancy is by matters subsequently occurring fixed in the sense that it is for a definite period."

In the present case the implication that the parties must have intended to include in the new agreement all the terms of the old lease so far as they were applicable and were not inconsistent with the terms of the new agreement arises from the surrounding circumstances, and those circumstances are to be found in the conditions upon which the defendant held the premises under the old lease. The lease, which was an underlease, was of a special character. It was a lease of part only of the house. It contained, among other things, a covenant by the landlord to pay the rates and taxes. Having regard to the surrounding circumstances I find it impossible to come to any other conclusion than that the parties must have intended to include by implication in the new agreement arrived at by the letters, which in terms referred only to the duration of the tenancy, the obligation to repair contained in the old lease.

It is then said that, even if that is so, the implied term is not "contained" in the lease within the meaning of s. 10, sub-s. 1, of the Conveyancing Act, 1881. It was decided by this Court in *Blane* v. *Francis* (1) that the expression "lease" in s. 10 means an instrument in writing. In the present case there was an agreement in writing and to that extent the requirements of the section are complied with. Is it true to say that the implied term as to repairs is "contained" in the agreement in writing in the letters?

(1) [1917] 1 K. B. 252.

C. A. 1920

COLE v. KELLY.

BANKES L.J.

In my opinion it is. All the terms of the written agreement, whether express or implied, are "contained" in the written agreement, the terms implied being such as the parties must have intended should be included in it. This view seems to me to be borne out by what Lord Esher M.R. said in *Hamlyn* v. *Wood* (1) with reference to the principle upon which terms are implied: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." He there spoke of it as a stipulation in the agreement. For these reasons I am unable to take the same view upon this point as the learned judge who came to the conclusion that upon the true construction of the section the implied terms of the agreement of tenancy were not "contained" in the new agreement. Upon this point the appeal succeeds.

It was also argued that the plaintiff was entitled to recover damages for breaches of the covenants to repair in the original underlease of February 24, 1913. The plaintiff could only sue in respect of those breaches of covenant if she was in a position to prove that she was an assignee of the accrued right of action in respect thereof, and had given due notice as required by s. 25, sub-s. 6, of the Judicature Act, 1873, if she desired to bring an action in her own name. No such case is made on the pleadings nor was it made at the trial, and no amendment of the pleadings ought to be allowed to enable the plaintiff to raise the point now, because upon the evidence at present before the Court I can see no trace of any notice of assignment. In these circumstances it is not necessary to express any opinion as to whether the plaintiff is an assignee of the alleged accrued cause of action for breaches of covenant under the original underlease. I only say this, that I think that the clause of the underlease of July, 1918, which was relied upon as an assignment, is expressed in language which makes it difficult to say what

(1) [1891] 2 Q. B. 488, 491.

ts true construction is. I therefore express no opinion upon it.

The appeal will be allowed and the judgment for the defendant set aside, and judgment entered for the plaintiff for damages for breach of the covenant to repair and to deliver up in repair contained in the agreement for the quarterly tenancy, the damages to be assessed by an official referee unless the parties otherwise agree.

SCRUTTON L.J. The arguments in this case have covered a wide field, but the most important part of the case ultimately depends upon the meaning of two words in s. 10, sub-s. 1, of the Conveyancing Act, 1881.

Miss Hammond had a leasehold interest in a house in London. She sublet certain parts of the house to the defendant, Mrs. Kelly, for a term from December 25, 1912, to December 25, 1917. When the term had nearly expired it was agreed by certain letters passing between the defendant and the administrators of Miss Hammond, who had died, that the defendant should continue in occupation on a quarterly tenancy, no detailed terms of her tenancy being stated in the letters constituting the new agreement. In July, 1918, while the quarterly tenancy was continuing the administrators of Miss Hammond granted in præsenti a sub-lease of the whole house to the plaintiff, Mrs. Cole, for the residue of the term granted to Miss Hammond less three days subject to but with the benefit of the indenture of underlease to the defendant. I cannot help thinking that the draftsman of that underlease was under the impression that the five years' lease was continuing in operation, so that the plaintiff's lease would be subject to it and that she would have the benefit of it. On September 29, 1918, the defendant, having given due notice, determined her quarterly tenancy and quitted possession. The plaintiff thereupon entered into possession and sued the defendant for damages for breaches of the repairing covenants during the period both of the five years' lease and of the quarterly tenancy.

C. A. 1920

COLE v. KELLY.

Scrutton L.J.

Sect. 10 of the Conveyancing Act, 1881, provides that the benefit of every covenant or provision contained in a lease shall go with the reversionary estate in the land immediately expectant on the term granted by the lease. The plaintiff had a term immediately expectant on the defendant's quarterly tenancy. The question is, was the covenant to repair, originally expressed in the five years' lease, a covenant "therein"—that is, in the agreement for the quarterly tenancy—"contained"? This Court decided in *Blane* v. *Francis* (1) that s. 10 only applies to a lease in writing. In that case the tenant held over after the expiration of the term, there being no writing, on the terms of the old lease, and it was held that there was no lease which "contained" the covenants for the period of the holding over. In the present case the quarterly tenancy, which continued for three quarters after the expiration of the five years' lease, was under the agreement in writing in the letters. Were the repairing covenants implied in that agreement in writing? If the tenancy was on the terms of the repairing covenants, were the covenants "contained" in the lease, that is, in the agreement in the letters? Now, where a tenant has for five years been in occupation of part of a house on detailed terms as to its occupation, on terms that the landlord shall pay all rates and taxes, that the tenant shall pay for the gas she consumes, and that she shall not make any alterations or additions except with the consent of the landlord, and she continues in occupation after the expiration of the term under an agreement for a quarterly tenancy, are not those terms carried on by implication into the quarterly tenancy? I think that the tenant would have been very much surprised if she had been asked to pay the rates which the landlord had previously paid. The same observation applies to the provisions as to the gas, the alterations, and the use to which the premises might be put. I have no doubt that the quarterly tenancy was on the terms of the previous lease so far as applicable, including the covenants to repair, and that those terms were to be implied from the circumstances

(1) [1917] 1 K. B. 252.

of her previous tenancy and the language of the letters about continuing and remaining on.

Then comes the question, which is the main one in the case, whether the term so implied from the surrounding circumstances is "contained" in the lease. If a term were merely implied by law from the language with no evidence as to facts, it seems to me from the old authorities that an assignee of the reversion could sue on it without the assistance of s. 10 of the Conveyancing Act, 1881. It is so stated in some of the old authorities cited by Swinfen Eady L.J. in *Wedd* v. *Porter* (1), and I accept it as good law. Can the assignee now sue where the term is implied from the language construed in the light of the surrounding circumstances? In my view he can. The term is contained in the lease construed with reference to the surrounding circumstances. The fact that there is evidence of the surrounding circumstances in order to construe the language which the parties have used in their written agreement does not seem to me to make it the less a covenant "therein contained" within the meaning of s. 10 of the Act. Lush J. took the view that, though there was such a term by implication, it could not be said to be "contained" in the lease. That is too narrow a view to take of the section. When a term is implied in a lease from the language used and the surrounding circumstances, the implied term is "contained" in the lease within the meaning of the section. This has the result of giving the plaintiff the right to sue for damages under the covenants of the lease as contained in the quarterly tenancy. But I think it also follows from the language of the section that it does not on the facts of this case give her a right to sue for a breach of the covenants to repair in the five years' lease, as her reversionary estate in the land was not immediately expectant on the term granted by that lease. I do not express any opinion whether, if the plaintiff brings a new action and proves a good notice of assignment, the alleged assignment being the clause giving her the benefit of the five years' lease, she will not, under the recent decision

(1) [1916] 2 K. B. 101.

C. A. 1920

COLE v. KELLY.

Scrutton L.J.

of this Court in *Ellis* v. *Torrington* (1), be able to sue for damages for breaches of the repairing covenants contained in the five years' lease. I do not express any opinion on that point. It is not pleaded, nor was it argued below.

The result is that the plaintiff has a right to sue for damages for breaches of the covenant to repair contained in the agreement for the quarterly tenancy, but no right at present to sue for damages for breaches of the covenant to repair in the five years' lease; and we express no opinion as to the possibility of suing on the alleged assignment of accrued causes of action for breaches of the covenant to repair, if any, in the five years' lease. The appeal will be allowed.

ATKIN L.J. The first question is, Upon what terms did the defendant hold the premises under the new quarterly tenancy? In reference to that one has to approach the question recognizing that the law is that, "where tenants hold over after the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, then the law determines that they impliedly hold subject to all the covenants in the lease which are applicable to the new situation:" per Swinfen Eady L.J. in *Wedd* v. *Porter*. (2) I think that that rule applies wherever there has been a holding over, the law being, as I understand it, that a holding over with the consent of the landlord prima facie gives rise to a tenancy at will, which by subsequent payment of rent may be converted into a tenancy from year to year; or the parties may by their acts or by agreement convert the tenancy at will into a tenancy of a more fixed duration, as a weekly, or a monthly, or a yearly tenancy. But in all those cases, unless there is something to contradict the view that the tenant will continue to hold upon the terms of the old tenancy, then those terms, so far as they are applicable, as Swinfen Eady L.J. said, to the new situation, will apply. I accept the view expressed by Cozens-Hardy M.R. in *Morgan* v. *Harrison* (3), where, after the passage read by

(1) [1920] 1 K. B. 399. (2) [1916] 2 K. B. 98.
(3) [1907] 2 Ch. 143.

Bankes L.J., which I need not read again, he went on to say: "I am prepared to hold that where you find an express tenancy at will created on the termination of a lease, the same principle ought to be applied as would apply if you had a subsequent agreement to pay either the original rent or an increased rent—that is to say, all the terms and conditions of the original lease apply so far as they are consistent with such tenancy." One has to approach the case upon that footing, and even without reference to those principles of law it appears to me that upon the true construction of the letters in this case, construing them, as one is obliged to construe all documents which are alleged to contain contractual terms, with reference to the position of the parties at the time, the parties agreed that the quarterly tenancy should be subject to the terms of the former tenancy. The premises were business premises in Baker Street, let at a rent of 150*l.* a year, consisting of part only of the house, where arrangements had to be made for lighting such parts of the house as were used in common by the occupiers, and where it was certainly usual, and I should say necessary, to have a stipulation as to the repairs and as to payment of the rates by the landlord. It is suggested by the defendant that the new arrangement was simply one for a payment of 150*l.* a year for these premises on a quarterly tenancy. If that was the arrangement, it materially altered the terms of the tenancy. Whereas under the five years' lease the tenant paid 150*l.* a year and the landlord paid the rates, under the new suggested arrangement the tenant would pay 150*l.* a year and the rates. I do not believe that either party contemplated that or that the tenant would have agreed to it. I think that on the true construction of the letters—in one of which the landlords speak of the defendant wishing "to continue the tenancy," and in another of their letting the defendant "remain as tenant"—the parties contemplated that the terms of the former tenancy should continue to apply. I agree therefore with the learned judge that the terms of the old lease as to repairs were implied in the new agreement of tenancy. That being so, it seems to me to be far too

C. A. 1920

COLE v. KELLY.

Atkin L.J.

narrow a construction to place upon s. 10, sub-s. 1, of the Conveyancing Act, 1881, that those terms, implied as they are in the contract in writing, are not "contained" in that contract. That which is implied in a document is, in ordinary language, contained in it. I think it would be depriving the statute of its beneficial effect in removing technicalities if we were to substitute a technicality of the worst kind, and so defeat the object of the enactment. For these reasons I think that the implied term is " contained " in the document in which it is implied, and that therefore the plaintiff is entitled to sue in respect of the stipulations in the quarterly tenancy. We decide nothing as to the measure of damages in that claim. I also agree that it is not open to the plaintiff on the pleadings to claim in respect of the old lease which had expired some months before she acquired any title to these premises. It seems to me that she can only do so under an assignment of a chose in action by her lessors. No such claim as that has been made on the pleadings, and I say no more about it. The judgment for the defendant will be set aside.

Appeal allowed.

Solicitor for plaintiff: *J. H. Tuppen.*
Solicitors for defendant: *Kenneth Brown, Baker, Baker.*

W. F. B.

BRADFORD CORPORATION AND ANOTHER *v.* WEBSTER.

1920
Jan. 12;
Feb. 12.

[1919. B. 176.]

Negligence—Injury to Constable in Service of Corporation—Action by Corporation against Tortfeasor—Loss of Service—Measure of Damage—Wages during Incapacity—Pension.

By the contract entered into in 1901 between a municipal corporation and a constable in their service, the constable, if injured in the execution of his duty, was entitled to full pay during his incapacity. By the Police Act, 1890, and Regulations thereunder, the constable, if he had been able to serve until 1926, would have been entitled to retire on an annual pension of about 67*l.*, but, if at any time he was permanently incapacitated by injury in the execution of his duty, he was to be entitled to a special pension at a higher rate. Pensions were paid out of a police pension fund to which the Corporation contributed only 31¾ per cent., the rest of the fund being derived from other sources. In September, 1917, the constable, then aged thirty-nine, was injured in the execution of his duty by a steam wagon belonging to the defendant in charge of his employee. From the date of the constable's injury to October, 1918, when it was first known that he was permanently incapacitated, the Corporation paid him his full wages, amounting to 185*l.* 0*s.* 10*d.*, and as from the latter date they awarded him a special pension for life of about 99*l.* per annum. In June, 1919, the Corporation brought an action against the defendant for damages for loss of service of the constable by the alleged negligence of the defendant's employee which the defendant admitted:—

Held, that the plaintiff Corporation was entitled to recover, as damages in respect of the wages paid to the constable, the amount thereof, namely, 185*l.* 0*s.* 10*d.*; that, in view more particularly of the facts that in consequence of the injury to the constable the Corporation had to pay him a pension sooner and at a higher rate than would otherwise have been the case, the Corporation was entitled to recover as damages in respect of the pension, a sum which in all the circumstances would be fairly assessed at 150*l.*; and that there should therefore be judgment for the Corporation for 335*l.* 0*s.* 10*d.*

FURTHER consideration by A. T. Lawrence J. of an action tried by him without a jury.

The City of Bradford had a duly established police force and the Corporation of the city, acting through their Watch Committee, were the police authority of the force.

The contract of service of each constable of the force was

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

subject to the following among other conditions: that he should devote the whole of his time to the police service and engage in no other occupation; that he should receive his pay weekly; that his pay would be 23*s.* per week on appointment, rising according to scale to 29*s.*, in addition to which an allowance of 2*s.* per week might be granted for meritorious conduct and general efficiency; that half pay was granted during sickness except in cases where the constable was injured in the execution of his duty, when full pay was allowed.

Pursuant to the Police Act, 1890 (53 & 54 Vict. c. 45) (1), that police force maintained a pension fund for the payment, in accordance with the provisions of the Act, of pensions to constables who were entitled to them on retiring from the force. The police authority for the district had adopted the maximum scale of pension under that Act, and had fixed the limit of age at which a constable might retire on superannuation at 52 years.

In March, 1901, Joshua Simeon Smith, then in the twenty-third year of his age, entered into a contract with the Bradford Corporation to serve as a constable in the said police force subject to the above-mentioned conditions. On September 4, 1917, when Smith was on traffic duty at the end of Market Street in front of the Midland Railway station, Bradford, he was knocked down and injured by a steam wagon belonging to Joseph Webster and in charge of and driven by a servant of the latter.

From the last-mentioned date to the next-mentioned date the Bradford Corporation continued to pay to Smith his full wages and allowances.

(1) The most material provisions of the Police Act, 1890, for the purposes of this case are s. 1, which provides that subject to the provisions of the Act every constable in a police force shall under the conditions there specified be entitled to a pension; s. 3, which makes provision for the pension scale to be adopted by a police force under the First Schedule to the Act; s. 16, which provides that there shall be a pension fund of every police force, and which together with s. 17 specifies the sources from which the fund is to be maintained; s. 19, which provides for the guarantee of the pension fund by the police fund; and the First Schedule above mentioned.

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

On October 8, 1918, the Bradford Corporation, being satisfied on the evidence that Smith had received his injury in the execution of his duty without his own default, that he was thereby incapacitated for the performance of his duty, that his incapacity was likely to be permanent, and that he was totally disabled from earning his livelihood, granted him a special pension of 99*l.* 1*s.* 5*d.* per annum for three years in accordance with First Schedule, Part II., cl. (5), Scale D, under the Act of 1890 and Regulations of the Police Authority thereunder.

On June 7, 1919, the Bradford Corporation and Smith brought the present action against Webster, the plaintiffs severally claiming damages for the injury to the plaintiff Smith by the negligent driving of the defendant's servant.

The plaintiffs in their statement of claim alleged (para. 2) that on September 4, 1917, the defendant's servant so negligently drove or steered a steam-wagon that the plaintiff Smith was knocked down and injured; (para. 3) that by reason of the premises (*a*) the plaintiff Corporation had suffered damage through the loss of the service of the plaintiff Smith, and by reason of the provisions of s. 1 (*d*) of the Act of 1890, had been compelled to award him a pension, the particulars of their special damage being: wages paid to the plaintiff Smith from September 4, 1917, to October 8, 1918, 185*l.* 0*s.* 10*d.*, and pension of 99*l.* 1*s.* 5*d.* per annum to the plaintiff Smith for three years from October 9, 1918, 297*l.* 4*s.* 3*d.*, amounting together to 489*l.* 5*s.* 1*d.*; and (*b*) the plaintiff Smith had suffered damage, the particulars of his special damage being set out; and that the plaintiffs also severally claimed general damages. The claim of the plaintiff Corporation for special and general damages as eventually formulated in December, 1919, before the trial of the action, was 1032*l.* 13*s.* 8*d.*

The defendant in his defence stated (para. 2) that he admitted that the accident to the plaintiff Smith was due to the negligence of the defendant's servant; (para. 3) that he denied the allegations of para. 3 of the statement of claim and of the particulars thereunder; and (para. 4) that the

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

special damage alleged to have been suffered by the plaintiff Corporation was in any event too remote.

The defendant settled the claim of the plaintiff Smith before the trial of the action, but he disputed the claim of the plaintiff corporation.

In December, 1919, the action came on for trial at Leeds Assizes and was part heard there but adjourned for further consideration to London.

Evidence was given by Mr. F. O. Whiteley, the City Treasurer of Bradford, as to the sources of income of the pension fund of the Bradford police force. Contributions were made every year to the fund from the sources, or most of them, mentioned in s. 16, sub-ss. 1 and 2, of the Act of 1890, and after these contributions had been received any deficiency in the fund for the year was made up in equal parts by the Corporation and the Government. In the last financial year preceding the trial of the action the total amount supplied to the fund was upwards of 8000*l.* of which 36½ per cent. was derived from the contributions above mentioned, the remaining 63½ per cent. being made up in equal parts out of the city rates and the Government allowance. The amount contributed to the fund by the plaintiff Corporation was thus 31¾ per cent., the remaining 68¼ per cent. coming from other sources.

Mr. Whiteley also explained how the plaintiff Corporation formulated their claim of 1032*l.* 13*s.* 8*d.* That sum was made up of (1.) 185*l.* 0*s.* 10*d.* for full pay and allowances actually received by Smith from the date of his injury to October 7, 1918, when it appeared that he would be unable to resume duty. (2.) 847*l.* 12*s.* 10*d.* in respect of the special pension of 99*l.* 1*s.* 5*d.* per annum granted to Smith as from the latter date. That figure was arrived at thus: When the claim was formulated Smith had attained the age of forty-one. At that age a normal male has an expectation of life of twenty-five years, but an expectation of life of twelve years only was assumed in Smith's case. It was also assumed that the full pension of 99*l.* 1*s.* 5*d.* per annum granted to Smith for three years from October 8, 1918, would be continued during his

life. On these assumptions this part of the claim was calculated as follows: The amount of the pension that had actually been paid for the year ending October 7, 1919, was 99*l.* 1*s.* 5*d.* The present value of the pension for the then remaining two years of the three years for which the pension had been actually granted, on a 5 per cent. basis was 184*l.* 4*s.* 3*d.* The present value of a similar pension from October 8, 1921, to October 8, 1926, was 428*l.* 18*s.* 5*d.*, the former date being that on which the three years ended, and the latter date that on which the constable, if his services had continued, would have had an aggregate service of twenty-six years, and would have been entitled in normal circumstances to retire on a pension of 67*l.* 15*s.* 9*d.* per annum. The then present value of the difference between that normal pension of 67*l.* 15*s.* 9*d.*, and the special pension of 99*l.* 1*s.* 5*d.* from October 8, 1926, for the remaining five years of Smith's assumed expectation of life was 135*l.* 8*s.* 9*d.*

Sir Francis Newbolt K.C. and *Frank Beverley* for the plaintiffs. The plaintiff Corporation bring this action against the defendant for damages for an injury to their constable by negligence for which the defendant is responsible, whereby they have lost the service of the constable.

The action for loss of service of the plaintiffs' servant by the wrongful act of the defendant is an old and familiar form of action. Three varieties of it may be distinguished: first, the action for the seduction of a female servant; secondly, the action for procuring a servant to leave his master in breach of his contract of service; and thirdly, the action for a physical injury to the servant by the tort of the defendant, of which the present action is an example. In each of these cases the gist of the action is loss of service; unless the master can show that the injury has caused loss of service he cannot maintain the action: *Hall* v. *Hollander* (1) and *Grinnell* v. *Wells* (2); and, on the other hand, if he can show some loss of service, however slight, the action lies.

In these cases the damages are not limited to the actual

(1) (1825) 4 B. & C. 660. (2) (1844) 7 Man. & G. 1033.

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

loss of service resulting from the wrongful act, but are left at large and may be awarded for any consequential or prospective loss arising from that act: *Hodsoll* v. *Stallebrass* (1) and *Martinez* v. *Gerber*. (2) The jury may have regard to such consequential damage as for example the inconvenience caused to the master by the interference with his servant, or his trouble in finding another servant, and also to the consideration that in these cases the damages may be exemplary, provided that the sum which they award is not unreasonable in amount.

In the present case the plaintiff Corporation are entitled to recover as damages the amount of the wages which they paid to the constable from the date of his injury down to October 8, 1918. If the constable had not been injured they would have received his services during that time in return for these wages. By reason of the wrongful act of the defendant they lost the constable's services during that time. As the wages were the equivalent of the services, the amount of the wages is the measure of the damages to which the plaintiffs are entitled in respect of the actual loss of the constable's services during that time.

The plaintiff Corporation are also entitled to damages in respect of the special pension which they became bound to pay to the constable under s. 1 (*d*) of the Police Act, 1890, as from the last-mentioned date. The payment of that pension is a loss caused to them by the wrongful act of the defendant's employee which rendered the constable unfit for further service. That special pension, unlike an ordinary pension, is not paid to the constable only in consideration of his past services, but also as compensation for the incapacity resulting from his injury. The sum claimed in respect of the pension has been fairly arrived at. In estimating it, allowance was made for the fact that if the constable had continued to serve until 1926 he could then have retired on an ordinary pension less by about one-third than the special pension. The whole burden of the pension is borne by the plaintiff Corporation. The pension fund out

(1) (1840) 11 Ad. & E. 301. (2) (1841) 3 Man. & G. 88.

of which it is paid is under the control of the Corporation who, in certain cases, have a discretion as to the application of the money: see s. 21 of the Act of 1890. That fund is no doubt supplied from other sources besides the borough rate; but as soon as the contributions from these other sources are paid into that fund they become the money of the plaintiff Corporation. On the death of the pensioner the money which he would have received if he had lived would not pass to his representatives or revert to those who contributed it but would remain in the hands of the Corporation. At all events the plaintiff Corporation provide upwards of 30 per cent. of the pension fund and they are entitled to a corresponding proportion of the damages which they claim in respect of the pension in question.

Lowenthal for the defendant. The plaintiff Corporation bring this action for damages for alleged loss of service of their constable by the negligence of the defendant's employee.

As has already been stated, the gist of an action of this kind is loss of service, and unless the plaintiff can show loss of service he cannot maintain the action: *Grinnell* v. *Wells* (1) and Clerk and Lindsell on Torts, 5th ed., pp. 225, 230. Even in the case of the action of seduction, in which a less rigid view is taken, some loss of service must be shown or the action will not lie. The loss of service contemplated is obviously loss of service subsequent to the date of wrongful act.

In the present case the plaintiff Corporation do not show that they have suffered any damage by the loss of service of the constable since the date of his injury. They have brought no evidence to prove that it was necessary for them to employ another constable to take the place of the injured constable, or, if it was, that they experienced any difficulty in finding a suitable substitute.

The only damage which the plaintiff Corporation allege or prove is that they have had to pay the constable wages from the date of his injury down to a later date, and that they have

(1) 7 Man. & G. 1033.

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

had to grant him a pension as from that later date. Neither the wages nor the pension is an item of damage resulting from the loss of the constable's services since the date of his injury.

The payment of these wages, which the plaintiff Corporation was bound by contract to pay to the constable, may have caused them damage, but it was not damage from loss of service: per Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika*. (1)

Nor is the obligation of the plaintiff Corporation to pay the pension damage arising from loss of the constable's future services. In *Admiralty Commissioners* v. *S.S. Amerika* (1) it was held that the plaintiffs could not recover damages in respect of pensions payable to the relatives of seamen in their service who had been drowned by the tortious act of the defendants. That case is no doubt distinguishable from the present inasmuch as there the pensions were in the nature of compassionate allowances, whereas here the plaintiff Corporation are obliged to pay the pension both by statute and by contract; but both Lord Parker (2) and Lord Sumner (3) in giving judgment in that case stated that even if the pensions there in question had been granted pursuant to contracts they would not have been recoverable as damages for loss of service, but would have constituted deferred payment for the past services of the seamen, or an incident of the remuneration which they had already earned. The plaintiff Corporation supply only about 30 per cent. of the pension fund, and in no view can they recover more than a similar proportion of the damages which they claim in respect of the pension.

Feb. 12. A. T. LAWRENCE J. read the following judgment. Joshua Simeon Smith, a police constable, in the employment of the Corporation of Bradford, was on September 4, 1917, knocked down and seriously injured while in the discharge of his duty by a steam wagon the property of the defendant.

(1) [1917] A. C. 38, 61. (2) Ibid. 42.
(3) Ibid. 61.

The negligence of the defendant's servant, the driver of the steam-wagon, has been admitted.

The question raised by the defendant has been what is the measure of damages which the plaintiffs, the Corporation, are entitled to recover. The defendant settled Smith's personal claim before the hearing.

The plaintiffs claim under two heads. First, for wages paid Smith while incapacitated. Second, in respect of the pension to which he became entitled when it became apparent that the injuries had rendered him permanently unfit to discharge his duties. It was urged for the defendant that both these heads of damage were too remote. It was admitted by the defendant's counsel that the plaintiffs could recover for the loss of the services of Smith, but it was argued that neither of the matters claimed was any measure of the loss of those services.

By the contract of employment it was provided that the constable if injured in the execution of his duty should be entitled to full pay. By the Police Act, 1890, s. 1 (*d*), a police officer incapacitated by injury received in the execution of his duty is entitled to a pension.

In this case Smith was paid his wages and allowances from the date of the accident till October 7, 1918, the sum paid amounting to 185*l.* 0*s.* 10*d.* From that date he has been paid, and is still being paid, the pension to which he is entitled according to the statute and the regulations made thereunder.

I find that it was reasonable to continue to pay Smith his wages until October 7, 1918, in order to ascertain whether he might not recover sufficiently to resume duty. Unfortunately, the effect of his injuries made it then clear that he had become permanently incapacitated. It was not suggested that there was anything unusual or unreasonable in the terms upon which Smith was employed by the Corporation. They were bound to make these payments by the terms of the contract of employment. I think it is clear that the plaintiffs are entitled to recover the amount they have duly paid Smith as wages while

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

A. T. Lawrence J.

they were not, in consequence of his injuries, receiving his services.

Their claim to recover in respect of the pension is a novel one in my experience. It is clear that Smith has become chargeable on the pension fund solely by reason of the injuries caused by the defendant's servant; until those injuries were received he was a hale and hearty man fully capable of performing his duties. This is not disputed, nor is it suggested that he did not thereby become entitled to the pension that has been granted to him.

What is contended is that a pension is too remote in law to become a subject of consideration in the assessment of damages, and, for this, observations of Lord Parker of Waddington and Lord Sumner in the case of *Admiralty Commissioners* v. *S.S. Amerika* (1) are relied upon. In that case the pensions paid to the relatives of the deceased were "compassionate allowances" voluntarily paid by the Lords of the Admiralty to the relatives of the deceased, and were not sums which the Admiralty were under any legal obligation to pay. The case itself, therefore, is no authority here, as was frankly admitted by counsel for the defendant. It is true, as he contended, that the dicta of the noble Lords to which I have referred do cover this case. They must therefore be considered, and must be followed if they are in accordance with principle. It is true, as they say, that that which the plaintiffs have lost by reason of the tort is the then future service of their servant, and that what they must be compensated for is the value of that which they have lost.

A pension may, no doubt, be properly regarded as payment for past services, but that fact does not exclude it from consideration in estimating the value of the services lost. But for the injuries the services of the constable would have been as valuable after the date of the injuries as they had been before that time. The cost of the services to the plaintiff Corporation was pay, plus the plaintiffs' contribution to the pension fund. No ground has been suggested for

(1) [1917] A. C. 38, 42, 61.

holding that the services were not worth that which was paid for them. If this be so the services which were lost were worth pay, plus right to pension. Both would not accrue for payment at the same time, but pay would be due while temporary incapacity continued, and pension would become due if and when it became apparent that the incapacity was permanent. The right to the statutory pension at the age of fifty-two years and upon incapacity at an earlier age is just as much the consideration for the services of a constable as the wages themselves, and I do not doubt that police authorities could not obtain the services of men of suitable class and adequate intelligence at the present rate of wages without the existing pension provisions. On the other hand the full amount paid to the injured constable by way of pension cannot be recovered by the plaintiffs or even taken into consideration in assessing their damages, for it is an expense that does not fall upon the plaintiffs.

The sources of the pension fund were given in evidence by the City Treasurer, and it resulted from the investigation of those sources that the amount contributed by the city was 31¾ per cent. only, the other 68¼ per cent. being derived from other sources. It may be said that the plaintiffs do not lose even this portion of the pension, for another man will have been engaged as a constable, and he will make contributions to the pension fund similar to those that were made by the injured man. But it is clear that if by reason of injuries constables in excess of the actuarial normal were thrown upon the fund the expenses of their pensions would fall upon the borough (Police Act, 1890, s. 19), since it has to make good any deficiency.

The City Treasurer proved that Smith would not have been able to retire on a pension until the year 1926, and that on retirement without injury his pension would have been at a considerably less rate than the pension due to him as a permanently injured man.

I do not think it would be right, or that it is possible, to assess the damages in respect of pension arithmetically, as

1920

BRADFORD CORPORATION AND ANOTHER v. WEBSTER.

A. T. Lawrence J.

there are so many contingencies which cannot be foreseen. The things that are certain are that his right to pension was accelerated by his injuries, and that it became payable at a higher rate in consequence thereof. These are matters which I think a jury ought to take into consideration in assessing the loss thrown upon the plaintiffs by having to find an untrained man to supply the place of a fully qualified and experienced constable.

I come to the conclusion that acting as a jury I shall be amply compensating the plaintiffs in this case if I assess the damages at 335*l.* 0*s.* 10*d.*, that is to say, 150*l.* in addition to the 185*l.* 0*s.* 10*d.* paid to Smith while his injuries were deemed to be temporary. I give judgment for 335*l.* 0*s.* 10*d.*

Judgment accordingly.

Solicitor for plaintiffs : *N. L. Fleming, Bradford.*
Solicitors for defendant : *F. G. & H. E. Smith, Bradford.*

J. R.

1920
Feb. 6, 9, 12.

ATTWOOD *v.* LAMONT.

Restraint of Trade—Contract of Service—Severability of Covenant.

Reversed (1920) 3 K.B. 571

The plaintiff carried on business at Kidderminster as a draper, tailor and general outfitter. By a contract for the employment of the defendant by the plaintiff as an assistant in the tailoring department of his business the defendant agreed that he would not at any time thereafter "either on his own account or on that of any wife of his or in partnership with or as assistant, servant or agent to any other person, persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within a radius of ten miles of" Kidderminster. The defendant subsequently set up business as a tailor at Worcester, outside the ten miles limit, but obtained and executed tailoring orders in Kidderminster :—

Held, that the covenant was wider than was reasonably necessary

for the protection of the plaintiff's business, but that it was severable by striking out all the enumerated trades except that of a tailor and by limiting its operation to the trade or business of a tailor, and an injunction was granted restricted to the tailoring trade.

Dictum of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* [1913] A. C. 724, 745, that a covenant in restraint of trade ought only to be enforced "in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause," considered and not followed.

APPEAL from a decision of the judge of the Kidderminster County Court.

In 1909 the plaintiff, Harry Attwood, carried on business in partnership with Charles Isaacs and Robert Isaacs at Kidderminster as drapers, tailors, milliners and general outfitters.

On February 15, 1909, Attwood and the two Isaacs entered into an agreement with the defendant, James Duncan Lamont, to employ him as a tailor's cutter and assistant in the tailoring department of their business at Kidderminster at an annual salary and commission. The agreement contained the following covenant by the defendant: "This agreement witnesseth that in consideration of the employers employing him in the capacity and at the salary aforesaid the assistant hereby agrees with the employers that he will not at any time hereafter either on his own account or on that of any wife of his or in partnership with or as assistant, servant or agent to any other person, persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within a radius of ten miles of the employers' place of business at Regent House, Kidderminster aforesaid." The agreement also provided that it should not be affected by any change or changes in the constitution of the employers' firm, but that in the event of any change or changes therein the right to enforce the agreement should continue to the surviving or continuing partner.

1920

ATTWOOD v. LAMONT.

There were a number of departments in the plaintiff's business—namely, men's tailoring, dressmaking, general drapery, millinery, gentlemen's, ladies' and children's outfitting, but the defendant had nothing to do with any of the departments except the tailoring department which he managed.

In March, 1919, the defendant left the employment of the plaintiff and set up business as a tailor at Worcester which was outside the radius of ten miles from Kidderminster. The defendant however approached a number of the plaintiff's customers and took and executed tailoring orders in Kidderminster, the clothes being tried on and delivered there; he also advertised in the local Kidderminster papers.

The plaintiff, who was the sole continuing partner in the business, brought an action in the county court for an injunction to restrain the defendant from committing any future breach of his agreement and claiming damages in respect of the breaches already committed.

The county court judge held that the covenant was wider than was reasonably necessary for the protection of the plaintiff's business, and that it was not severable. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Matthews K.C. (*G. A. Scott* with him) for the plaintiff. The covenant is not wider than is necessary for the protection of the plaintiff's business and it therefore does not require to be severed. The plaintiff carries on a number of businesses in the various departments of his shop. The evidence was that customers in one department of his shop were also customers in other departments, and therefore if the defendant chose to set up business in any of the branches of the plaintiff's business the plaintiff would equally require protection. The fact that the defendant only set up business in one department of the plaintiff's business does not show that the covenant is wider than is reasonable for the plaintiff's protection. If however the covenant is too wide it can be severed by striking out

all the enumerated trades or businesses other than that of a tailor. The principle upon which the Courts have acted is that wherever a covenant in restraint of trade taken as a whole goes further than the law will allow, if the covenant is so worded that that part which offends against the rules of law can be separated from the part which imposes a valid restraint, and can be struck out of the covenant as with a blue pencil, the Court will separate the good part from the bad and will enforce the covenant so far as it is valid. The Courts however will not recast a covenant which imposes a single restriction expressed in indivisible terms. The principle was stated by Willes J. in *Pickering* v. *Ilfracombe Ry. Co.* (1) as follows: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." Covenants have been held severable as regards subject-matter in *Davies, Turner & Co.* v. *Lowen* (2); *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (3); *Rogers* v. *Maddocks* (4); *William Robinson & Co.* v. *Heuer* (5); and *Bromley* v. *Smith* (6); as regards area in *Chesman* v. *Nainby* (7); *Mallan* v. *May* (8); *Price* v. *Green* (9); and *Underwood & Son* v. *Barker* (10); and as regards customers in *Nicholls* v. *Stretton* (11); *Baines* v. *Geary* (12); *Mills* v. *Dunham* (13); and *Dubowski & Sons* v. *Goldstein.* (14) Those authorities have not been reversed by recent decisions of the House of Lords.

Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (15) said that the general rule was that all restraints of trade of themselves, if there was nothing more,

(1) (1868) L. R. 3 C. P. 235, 250.
(2) (1891) 64 L. T. 655.
(3) [1893] 1 Ch. 630.
(4) [1892] 3 Ch. 346.
(5) [1898] 2 Ch. 451.
(6) [1909] 2 K. B. 235.
(7) (1727) 2 Ld. Raym. 1456; 1 Bro. P. C. 234.
(8) (1843) 11 M. & W. 653.
(9) (1847) 16 M. & W. 346.
(10) [1899] 1 Ch. 300.
(11) (1847) 10 Q. B. 346.
(12) (1887) 35 Ch. D. 154.
(13) [1891] 1 Ch. 576.
(14) [1896] 1 Q. B. 478.
(15) [1894] A. C. 535, 565.

1920

ATTWOOD v. LAMONT.

were contrary to public policy, and therefore void, but he went on to point out that a restraint of trade might be justified if the restriction was reasonable in reference to the interests of the parties concerned and also in reference to the interests of the public. Lord Herschell and Lord Watson also made it clear that their judgments were not intended to invalidate the previous decisions. In *Mason* v. *Provident Clothing and Supply Co.* (1) a canvasser had bound himself that he would not for three years after the termination of his employment with the respondents be employed by any person carrying on the same or a similar business to that of the respondents within twenty-five miles of London, and the House of Lords held that the restriction was wider than was reasonably necessary for the respondents' protection and therefore void. Viscount Haldane L.C. (2), Lord Shaw (3) and Lord Moulton (4) all pointed out however that a properly limited clause to prevent the appellant from canvassing for a similar business very near to his old place of employment would be a good covenant. There could be no question of severance of the covenant in that case as it was too wide in any view. The dictum of Lord Moulton (5) that a covenant which is framed in unreasonably wide terms ought not to be severed was not part of the ratio decidendi of that case and is not binding. The decision of the House of Lords in *Herbert Morris, Ld.* v. *Saxelby* (6) that a covenant was wider than was required for the protection of the plaintiff company and therefore not enforceable turned upon the special facts of the case. Both Lord Atkinson and Lord Parker of Waddington however pointed out that although an employer was not entitled to be protected against competition he was entitled not to have his old customers enticed away from him by solicitation or such other means. Sargant J. in *Nevanas & Co.* v. *Walker* (7) considered the observations of Lord Moulton in *Mason* v. *Provident*

(1) [1913] A. C. 724.
(2) Ibid. 732.
(3) Ibid. 736.
(4) Ibid. 743.
(5) [1913] A. C. 745.
(6) [1916] 1 A. C. 688, 702, 709.
(7) [1914] 1 Ch. 413, 422.

Clothing and Supply Co. (1), and expressed the opinion that those remarks were not intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants. Neville J. also subsequently held in *Goldsoll* v. *Goldman* (2) that a covenant as to area was too wide but was severable. That decision was affirmed by the Court of Appeal. (3) Lord Cozens-Hardy M.R. there said that the Court were bound by decisions of the Court of Appeal to hold that the doctrine of severability applied to the covenants in that agreement. It is therefore clear that the previous decisions to the effect that a covenant is severable are still binding authorities notwithstanding the dictum of Lord Moulton which was merely obiter and cannot overrule the previous decisions.

R. A. Willes and *Walter Warren* for the defendant. The result of the authorities is that the Courts are only entitled to sever covenants when they contain distinct negative obligations on the part of the covenantor. In the present case the covenant was a single indivisible covenant binding upon the defendant for the whole of his life and is therefore not severable. The covenant provides that the defendant shall not carry on business at all within the area where the plaintiff carries on business, and therefore the covenant would be bad even if all the enumerated businesses were struck out of the covenant except that of a tailor because it would prevent the defendant being employed in any capacity by a person carrying on a tailor's business within ten miles of Kidderminster; he might not even be a bookkeeper. There is no case in which a covenant restraining a servant from rendering assistance to another person has been severed.

[BAILHACHE J. There is no difference in principle whether the doctrine of severance is applied to area, subject-matter, class of customers, or to the kind of work open to the servant.]

Younger J. held in *Great Western and Metropolitan Dairies*

(1) [1913] A. C. 745. (2) [1914] 2 Ch. 603.
(3) [1915] 1 Ch. 292, 296.

1920

ATTWOOD v. LAMONT.

v. *Gibbs* (1) that a restrictive covenant in a service agreement was too wide and he refused to sever it as it precluded the defendant from occupying a position of any sort or kind not only in a dairy business or in the business of a dealer in dairy products, but also in that of a manufacturer of dairy plant, and that therefore the case fell within Lord Shaw's judgment in *Mason* v. *Provident Clothing and Supply Co.* (2) The dictum of Lord Moulton (3) in the latter case that the Court ought only to enforce a covenant in restraint of trade in cases where the part that is enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause, directly applies to the present case. Even if the covenant is severable it is not reasonable that it should be severed inasmuch as it binds the defendant for life. Phillimore L.J. expressed the view in *Eastes* v. *Russ* (4) that an employer is only entitled to "a covenant so limited as to time and place as to deprive the employee of any and every benefit which might accrue to him in the way of connection or reputation or personal knowledge of the customers," and that a prohibition for life was unreasonable. As was pointed out by Lord Shaw in *Mason's Case* (5), Courts of law should not be astute to disentangle a valid contract and to grant injunctions or restraints which are not justified by the terms of the contract.

Matthews K.C. in reply. A covenant in restraint of trade is entered into for the protection of the goodwill of the employer's business and it only lasts as long as that protection is necessary, and therefore even although no limit of time is expressed in a covenant the Courts will provide a limitation. There is no case in which the Courts have held a covenant which was reasonable in other respects to be bad because it contained no limitation as to time. He cited *Bromley* v. *Smith* (6); *Mumford* v. *Gething* (7); *Hitchcock* v. *Coker* (8);

(1) (1918) 34 Times L. R. 344.
(2) [1913] A. C. 737.
(3) Ibid. 745.
(4) [1914] 1 Ch. 468, 490.
(5) [1913] A. C. 742.
(6) [1909] 2 K. B. 235.
(7) (1859) 7 C. B. (N. S.) 305, 317.
(8) (1837) 6 Ad. & E. 438.

1920

ATTWOOD v. LAMONT.

Mallan v. *May* (1); *Hastings* v. *Whitley* (2); *Sainter* v. *Ferguson* (3); *Howard* v. *Woodward* (4); *Gravely* v. *Barnard* (5); *May* v. *O'Neill* (6); *Jacoby* v. *Whitmore* (7); *Webb* v. *Clark* (8); *Parsons* v. *Cotterill* (9); *Palmer* v. *Mallet* (10); *Haynes* v. *Doman* (11); *Hood and Moore's Stores* v. *Jones* (12); *Lyddon* v. *Thomas* (13); *Edmundson* v. *Render* (14); *Dewes* v. *Fitch* (15); *Sir W. C. Leng & Co.* v. *Andrews.* (16)

Cur. adv. vult.

Feb. 12. The following written judgments were delivered.

BAILHACHE J. There are three questions for decision in this case. First, whether a restrictive covenant in a contract of service made between the plaintiff and his partners, the employers, and the defendant, the servant, dated February 15, 1909, is void as being in restraint of trade. Second, if it is so void, can it be severed by deleting the excess and so leaving the remainder enforceable? Third, if that can be done, ought it to be done? [His Lordship then read the covenant and continued.] The facts are that the defendant was employed by the plaintiff and his partners as tailor's cutter in their tailor's business at a yearly salary and commission, but subject to a month's notice. He has now left and set up for himself at Worcester, more than ten miles from Kidderminster, but he has taken and executed tailoring orders in Kidderminster and so broken his covenant. The plaintiff sought an injunction in the county court, but the learned judge held that the covenant was unreasonable and bad. He refused to sever it and dismissed the action.

The test to be applied in considering the validity of these covenants is thus stated by Lord Macnaghten in the *Maxim*

(1) 11 M. & W. 653.
(2) (1848) 2 Ex. 611.
(3) (1849) 7 C. B. 716.
(4) (1864) 34 L. J. (Ch.) 47.
(5) (1874) L. R. 18 Eq. 518.
(6) (1875) 44 L. J. (Ch.) 660.
(7) (1883) 49 L. T. 335.
(8) (1884) 78 L. T. Newsp. 96.
(9) (1887) 56 L. T. 839.
(10) (1887) 36 Ch. D. 411.
(11) [1899] 2 Ch. 13.
(12) (1899) 81 L. T. 169.
(13) (1901) 17 Times L. R. 450.
(14) [1905] 2 Ch. 320.
(15) [1920] W. N. 23.
(16) [1909] 1 Ch. 763.

1920

ATTWOOD v. LAMONT.

Bailhache J.

Nordenfelt Case (1): "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Applying that test, this covenant would appear to be unreasonably wide, because it includes the other named businesses of the plaintiff with which the defendant had no concern, and is moreover for the period of his life, a circumstance to be taken into account when the restrictive covenant has other objectionable features. The question of the reasonableness of such a covenant is for the judge, who must bear in mind that wider restrictions are permissible where the contract is one of sale of the goodwill of a business or where the servant acquires trade secrets in the course of his employment. I cannot accept the argument that because as tailor the defendant would get to know persons who dealt with the plaintiff in the other departments of the business, the extension of the restrictions to those departments is reasonably necessary for the plaintiff's protection. I answer the first question, therefore, in the affirmative.

The next question is, can the covenant be severed so as to cut out the bad part and leave the good? Mr. Matthews in his very careful and exhaustive argument for the plaintiff cited to us a great number of cases, but as the principles are I think well settled I do not propose to do more than state

(1) [1894] A. C. 565.

the propositions which the authorities seem to me to support. Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with respect to area or subject-matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation, but the Courts will not split up a single restriction expressed in indivisible terms. As Mr. Matthews put it, the Courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise. To give an illustration, a covenant "not to carry on business in Birmingham or within 100 miles" may be severed so as to reduce the area to Birmingham, but a covenant "not to carry on business within 100 miles of Birmingham" will not be severed so as to read "will not carry on business in Birmingham." The distinction seems artificial but is I think settled.

This covenant is in my opinion severable by limiting its operation to the trade or business of a tailor. It would then, I think, be unobjectionable. True, the restriction would be for life, but (as I have always understood the cases) where the limit of area is reasonable, as the ten mile limit here, and where the rest of the clause is free from objection, the fact that the time limit is for life does not make the covenant unreasonable. I answer the second question also in the affirmative.

There remains the third question: Ought this covenant to be severed? As I gather from the authorities, there is no case in which the Courts have refused to exercise their power to sever where the covenant admits of it, and I might say "Yes" to this question without discussion or hesitation were it not for some observations of Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (1) He says: "I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only

(1) [1913] A. C. 745.

1920

ATTWOOD v. LAMONT.

Bailhache J.

in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master." In that case the House of Lords refused to enforce a covenant which was in some respects much more restrictive than the present but in regard to time was limited to three years. The House in that case while accepting the principle of severability declined to apply it. The covenant was indeed one which did not admit of severance on any view.

The only difficulty in this case is whether one ought to follow the older authorities or to give effect to Lord Moulton's dictum that the principle of severability ought only to be applied where the enforceable part of the covenant is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not part of the main purport and substance of the clause. If so, then here is a covenant in which the tailoring business can be clearly severed, but, on the other hand, so to sever the covenant and thus cut out the other businesses would be to cut out parts of the covenant which are of the main purport and substance of the clause and ought not, therefore, to be severed. I am satisfied, however, that the Courts have not acted upon the principles laid down by Lord Moulton. What they have done is to sever these covenants where the various restrictions are separately enumerated, and where the elimination of the invalid restrictions has left a substantial part of the covenant untouched. They have not confined the exercise of their power of severance to matters of only trivial or technical importance. It would probably be correct to say that the Courts would not sever a covenant

of this kind by striking out its important restrictions and leaving only restrictions of trivial importance standing. Lord Moulton's observations are of the greatest weight but they are not the judgment or the ratio decidendi of *Mason's Case*. (1) The principle of severability still obtains: see *Goldsoll* v. *Goldman* (2), and must I think be still applied by this Court, at any rate, on the lines established by the authorities.

Treating this covenant in that way, it seems to me I must sever it by striking out all the enumerated trades except that of a tailor. So severed, the covenant is I think valid and must be enforced.

This appeal, therefore, must be allowed and there will be an injunction in the terms of the covenant restricted to the tailoring trade—that is to say, striking out all the other enumerated trades.

SANKEY J. I agree. The plaintiff and a man named Robert Isaac, by an agreement dated February 15, 1909, employed the defendant as an assistant in the tailoring department of their business at Kidderminster, and the right to enforce the agreement is now vested in the plaintiff. On or about the fifteenth day of March of last year the defendant left the plaintiff's employment and set up in the trade or business of a tailor at Worcester. The plaintiff now seeks to prevent the defendant from carrying on such business and claims to be entitled to put in force against him a restrictive clause contained in the agreement. I need not read the clause again, as it has already been read by my Lord.

The learned county court judge decided in favour of the defendant, upon the ground that the agreement was in restraint of trade and so invalid; hence the present appeal.

The plaintiff contends: (1.) That the agreement is valid; and (2.) that, in any event, the invalid parts can be severed from the valid part, and that he is entitled to restrain the defendant from carrying on business as a tailor in the prohibited area.

(1) [1913] A. C. 724. (2) [1915] 1 Ch. 292.

1920

ATTWOOD v. LAMONT.

Sankey J.

As to (1.). In approaching such a question as this the memorable words of Sir George Jessel in *Printing and Numerical Registering Co.* v. *Sampson* (1) should always be remembered: "You have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." There is also another paramount public policy to consider—namely, the sanctity of contract—and the Courts should not lightly absolve parties from the performance of agreements solemnly entered into. I am clearly of opinion, however, as was the learned judge in the Court below, that this agreement as it stands is invalid, upon the ground that it is too wide. It goes beyond what is reasonably necessary for the protection of the plaintiff's business, and is such a restriction of the defendant's activities as to be injurious to the public, whose interests have to be considered in this matter as well as those of the parties.

As to (2.). The real difficulty in this case is whether the agreement is severable. The defendant relies upon the opinion expressed by Lord Moulton in the House of Lords in *Mason* v. *Provident Clothing and Supply Co.* (2) and urges that the Court ought not to sever and should not be astute in endeavouring to carve out for the plaintiff a valid out of an invalid agreement. In my view Lord Moulton did not intend to lay down that agreements of this character were not severable. It is to be observed that the point of severability was not really taken in *Mason's Case.* (3) It was not argued, and looking at the agreement itself it was not possible to sever the valid from the invalid parts thereof: per Lord Shaw. (4)

I do not think that the expressions used by Lord Moulton either did or were intended to overrule a long line of authorities beginning in the year 1726 and ending in the year 1909, all of which were cited to us by Mr. Matthews, and many of which are of the highest possible authority. It is clear that the Court of Appeal in the case of *Goldsoll* v.

(1) (1875) L. R. 19 Eq. 462, 465.
(2) [1913] A. C. 745.
(3) [1913] A. C. 724.
(4) Ibid. 742.

Goldman (1) took this same view of Lord Moulton's remarks, as did also Sargant J. in the case of *Nevanas and Co.* v. *Walker*. (2) Although, however, the Court should not be astute to sever illegal from legal parts of an agreement of this character, it is competent, in a proper case, for it to do so. The principles governing the rules of severability do not appear to have ever been laid down. It is not desirable to attempt to draw up a comprehensive code of those rules. In many cases all that learned judges have said is that the agreement under consideration was clearly severable. One rule, however, may be deduced from the decisions and that is that where, as here, there is a series of distinct obligations in separate and clearly defined divisions and not merely one obligation framed in alternative manners, the Court may sever. The result of the cases seems to show that the doctrine of severability has under these circumstances been applied: (*a*) to the subject-matter, (*b*) to the area, and (*c*) to the customers, not by adding new terms to the agreement, but by striking out therefrom the obnoxious ones; as for example, in *Rogers* v. *Maddocks* (3), by striking out the restriction against selling aerated waters from a contract which restricted the defendant from being concerned in selling malt liquors and aerated waters; in *Mallan* v. *May* (4), by striking out the restriction against practising as a dentist in an area outside London from a contract which restricted the defendant from practising both in London and the area outside it; in *Dubowski & Sons* v. *Goldstein* (5), by striking out "future customers" from a contract which restricted the defendant from dealing with persons who were customers of the plaintiffs during defendant's employment as well as with persons who might become future customers of the plaintiffs.

The present appears to be a case coming under head (*a*), for which there is ample authority in the following cases: *Davies, Turner & Co.* v. *Lowen* (6); *Maxim Nordenfelt Guns*

(1) [1915] 1 Ch. 292.
(2) [1914] 1 Ch. 413.
(3) [1892] 3 Ch. 346.
(4) 11 M. & W. 653.
(5) [1896] 1 Q. B. 478.
(6) 64 L. T. 655.

1920

ATTWOOD v. LAMONT.

Sankey J.

and Ammunition Co. v. *Nordenfelt* (1): per Lindley L.J. affirmed by the House of Lords (2): *Rogers* v. *Maddocks* (3); *William Robinson & Co.* v. *Heuer* (4); and *Bromley* v. *Smith* (5) per Channell J. The only suggestion of a difficulty in decreeing a severance here is that the contract is unlimited as regards time, but the result of the cases clearly shows that this does not render a clause bad which is otherwise unobjectionable. As far back as *Mumford* v. *Gething* (6) it was alleged that no case up till then could be found where a total time restraint had been held to be unreasonable, and since then decisions have been regularly given, and contracts or covenants in which there has been no time limit have been upheld. The latest is *Dewes* v. *Fitch* (7), where in December, 1919, Eve J. reviewed the authorities and upheld an agreement restraining for life the managing clerk of a solicitor from practising in the prohibited area.

In the result, these stipulations in my opinion should be severed and read as restraining the defendant from carrying on the trade or business of a tailor only, following the words of the agreement. The appeal must be allowed and an injunction granted in the terms already mentioned by my Lord.

Appeal allowed.

Solicitors for plaintiff: *Milner & Bickford, for H. G. Ivens, Kidderminster.*

Solicitor for defendant: *Arthur C. Dowding, for Eustace Roberts, Worcester.*

(1) [1893] 1 Ch. 630, 650.
(2) [1894] A. C. 535.
(3) [1892] 3 Ch. 346.
(4) [1898] 2 Ch. 451.
(5) [1909] 2 K. B. 235.
(6) 7 C. B. (N. S.) 305.
(7) [1920] W. N. 23.

R. F. S.

Overruled. CLARKE *v.* GRANT. [1949] 1 All E.R. 768.

Overruled. CLARKE *v.* GRANT [1950] 1 K. B. 104

HARTELL *v.* BLACKLER.

1920 *Feb.* 13.

Landlord and Tenant—Tenancy determined by Notice to quit—Tenant holding over—Tender of Rent by Tenant—Acceptance by Landlord otherwise than as Rent—Waiver of Notice.

A tenant whose tenancy had been determined by notice to quit wrote to his lessor enclosing money as and for rent accrued due since the expiry of the notice. The lessor sent on the letter and enclosure to her solicitors who replied "[our client] does not recognize you as her tenant, and we will retain the money for the time on account of use and occupation of her premises but not as rent":—

Held, that, notwithstanding the terms of that letter, the acceptance and retention of the money operated as a waiver of the notice and a recognition of a continuance of the tenancy.

APPEAL from the Torquay County Court.

In April, 1919, Mrs. Barchard was tenant to Mrs. L. F. Wood of a house and premises at Torquay known as Les Hirondelles, the tenancy being due to expire on June 1. The premises included a lodge which Mrs. Barchard had sublet on a weekly tenancy at a rent of 4*s.* a week to the defendant Blackler, who had formerly been a gardener in her employment. On April 8 Mrs. Wood contracted with the plaintiff, Mrs. Hartell, for the sale to her of Les Hirondelles with vacant possession on June 1. In order to assist in carrying out that contract Mrs. Barchard gave the defendant on May 12 notice to give up possession of the lodge on May 21. The plaintiff went into possession of the principal house early in June, but was unable to get possession of the lodge as the defendant refused to quit. The defendant on several occasions subsequent to May 21, when the notice to quit expired, tendered rent for the lodge to the plaintiff, but she always declined to accept it. On July 29 the defendant wrote to the plaintiff a letter saying "I enclose 8*s.* rent which was refused." The plaintiff forwarded that letter to her solicitors, Messrs. Elliot Square and Geake, who replied to the defendant as follows: "Mrs. Hartell has sent us your registered letter dated July 29 in which you enclose P.O.

1920

HARTELL v. BLACKLER.

for 8*s.* for rent 'which was refused'—Mrs. Hartell does not recognise you as her tenant, and we will retain the P.O. for the time on account of use and occupation of her premises but not as rent. Mrs. Hartell requires the lodge for the occupation of her own servants and you must give up possession at the earliest possible moment." In November, 1919, the plaintiff brought this action in the county court to recover possession of the lodge, alleging that she required it for a gardener in her employ, and that the defendant was a cause of nuisance and annoyance to her. The defendant relied on the Increase of Rent and Mortgage Interest (War Restrictions) Acts, 1915 and 1919.

The county court judge held that the acceptance and retention of the 8*s.* amounted to a recognition of the defendant's tenancy and a waiver of the notice, notwithstanding that the plaintiff's solicitors in terms refused to treat the payment as one of rent and repudiated the existence of any tenancy. He accordingly gave judgment for the defendant. The plaintiff appealed.

Harold Murphy for the appellant. In order that the acceptance of rent accrued due after the expiry of a notice to quit may operate as a waiver of the notice the money must not only be paid as rent, it must also be accepted as rent. In *Doe* v. *Batten* (1) Lord Mansfield and the full Court of King's Bench held that the mere acceptance of rent by a landlord for occupation subsequent to the expiry of a notice to quit is not of itself a waiver of the notice but matter of evidence for the jury. The question is "quo animo it was received." In *Goodright* v. *Cordwent* (2) Lord Kenyon said that if the money "were paid eo nomine as rent and received as such" the receipt was a waiver of the notice but not otherwise, and the other judges concurred. There the trial Judge had left the question to the jury who found that the money had been so received. In Woodfall's Landlord and Tenant in the chapter dealing with waiver of forfeiture it is said that "demand of rent accruing due

(1) (1775) 1 Cowp. 243. (2) (1795) 6 T.R. 219.

after the forfeiture" amounts to a waiver "if the demand be absolute and unqualified."

If this view is right—namely, that it is, as Lord Mansfield said, a question of fact in each case whether the landlord by accepting the money intended to create a new tenancy—it is perfectly clear that in the present case the plaintiff's solicitors did not intend to do so; they expressly negatived such intention. But in *Croft* v. *Lumley* (1) it was treated not as a question of fact but as one of law. There the lessor of the Covent Garden Opera House claimed that the lease had been forfeited for breach of covenant. The lessor subsequently to the alleged breach accepted rent from the lessee, but accepted it as compensation for occupation only and not as rent. Lord Campbell and the Court of Queen's Bench held as matter of law that, notwithstanding that qualification, the acceptance of the rent operated as a waiver of the forfeiture, upon the ground that "when money is paid, it is to be applied according to the expressed will of the payer and not of the receiver." On appeal to the Exchequer Chamber it became unnecessary to decide the point as the judges were of opinion that there had been no forfeiture. The case was then carried to the House of Lords (2), and the judges were consulted. Eight of them were for affirming the Queen's Bench, holding that there had been a waiver. They were of opinion that the lessor had no right to take the money at all unless he took it as rent. The ninth, Crompton J., dissented. He held that the rule Solvitur in modo solventis did not apply to such a case; that the question turned on the landlord's election, and that the landlord could not be held to have elected to treat the tenancy as continuing when he expressly said that he would not. As the two Law Lords who heard the appeal, Lords Cranworth and Wensleydale, came to the conclusion that there had been no breach of covenant and therefore no forfeiture, the question of waiver did not call for decision. Lord Cranworth said he expressed no opinion upon it. But Lord Wensleydale said he was inclined to agree with Crompton J.

(1) (1855) 5 E. & B. 648, 680. (2) (1858) 6 H. L. C. 672.

1920

HARTELL v. BLACKLER.

as to the inapplicability of the rule of Solvitur in modo solventis. He was of opinion that the question of waiver was one of fact. It is to be observed that that was a case of forfeiture not of notice to quit, and it may be that on that ground a distinction is to be drawn between *Croft* v. *Lumley* (1) and such a case as the present, for stronger evidence would be required of an intention to create a new tenancy than of a waiver of a forfeiture, a forfeiture being a thing against which the Courts have always leaned. But if no distinction can be drawn between the two cases it is submitted that the opinion of Lord Mansfield, Lord Wensleydale and Crompton J. are to be preferred to those of the other judges in *Croft* v. *Lumley*. (1). The question was again discussed in *Davenport* v. *The Queen*. (2) There a lease of Crown lands in Queensland had been granted to the appellant subject to certain conditions which he failed to perform, and the lease thereupon became liable to forfeiture. Subsequently to the appellant's breach of covenant the Government accepted rent from him for several successive years with full knowledge of the breach, but after notification in the Gazette that it would be received conditionally and without prejudice to the Government's rights. The evidence was that the Government of the colony wanted the money and could not afford to insist on the forfeiture. The Privy Council found as a fact that the money was not only paid but received as rent, and under those circumstances they held that a mere protest that it was received conditionally would not prevent such receipt from operating as a waiver of the forfeiture. It is true that they went on to say that a direction to the jury by the trial Judge "that the intention of the party receiving the rent and not of the party paying it must be looked at in considering the question of waiver" was erroneous. But that was merely obiter dictum, it was unnecessary to the decision.

No counsel appeared for the respondent.

BAILHACHE J. This case, which comes before us on appeal

(1) (1855) 5 E. & B. 648, 680. (2) (1877) 3 App. Cas. 115.

1920

HARTELL v. BLACKLER.

Bailhache J.

from the Torquay County Court, raises a point of considerable difficulty, on which there has been great difference of judicial opinion, and for that reason I regret that no counsel appeared to argue it on behalf of the respondent. It appears that the plaintiff purchased certain property including a lodge. At the date of completion of the purchase the defendant, who had previously been tenant of the lodge, but whose tenancy had been determined by notice to quit, was still in occupation of it and refused to give up possession. The plaintiff wanted the lodge for her gardener and brought this action for the recovery of possession. The defendant set up a defence under the Increase of Rent and Mortgage Interest (War Restrictions) Acts that he was unable to get suitable accommodation elsewhere, but that defence was not dealt with in the county court, as the judge came to the conclusion that the notice to quit had been waived and that the defendant's tenancy had not been determined. The question is whether the judge was right. The facts of the case are to be found in a letter written by the plaintiff's solicitors to the defendant. The defendant had sent two weeks' rent to the plaintiff. She refused to accept it, and sent it on to her solicitors who then wrote the letter in question. [His Lordship read the letter.] I may here observe that the defendant appears to have taken advice on the matter and to have been told that if he could get the rent accepted the notice to quit would be of no avail. The plaintiff's solicitors also were perfectly aware of the point which the defendant would probably raise when they wrote their letter. The county court judge said that, in his opinion, " the acceptance and retention of the rent paid, although accompanied by such protest, was an acknowledgment of a tenancy and a waiver of any notice." The plaintiff has appealed, and Mr. Murphy, on her behalf, contends that before acceptance of rent can operate as a waiver of a notice to quit it must not only be paid eo nomine as rent but also received as such, and that if the landlord at the time of the receipt is careful to say that he receives it as something else it is no waiver. It may be that there is some support for that proposition

1920

HARTELL v. BLACKLER.

Bailhache J.

to be found in the text-books, but after examining the authorities cited I have come to the conclusion that it is unsound. The clearest statement of the law on this point is, I think, to be found in the opinion of Williams J., one of the judges consulted by the House of Lords in *Croft* v. *Lumley*. (1) "It was established," he said, "as early as *Pennant's Case* (2) that if a lessor after notice of a forfeiture of the lease accepts rent which accrued after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this, that the lessor accepted the rent, but accompanied the acceptance with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion that this protest was altogether inoperative. As he had no right at all to take the money unless he took it as rent, he cannot, I think, be allowed to say that he wrongfully took it on some other account. And if he took it as rent, the legal consequences of such an act must follow, however much he might desire to repudiate them." Now that view might at first sight appear to be opposed to the cases which establish that where a debtor, admitting that a debt of a smaller amount than that claimed is due, sends his creditor a cheque as a payment in full of all demands the creditor is not precluded by keeping it as a payment on account from afterwards suing for the balance of his claim. (3) But the answer is this. In the case of the creditor accepting as a payment on account money which is offered as payment in full of a partly admitted liability it is common ground between the parties that at least the amount tendered is due, and the only question is whether the creditor is entitled to more. Therefore the creditor in taking it is doing a perfectly lawful act. Whereas in the case of landlord and tenant, as Williams J. points out, where money is paid as rent, the landlord does an unlawful act if he accepts and retains it in discharge of a debt of a different character such as compensation for use and

(1) 6 H. L. C. 672, 725.
(2) (1596) 3 Rep. 64a.
(3) See *Day* v. *McLea* (1889) 22 Q. B. D. 610.

occupation, and a man is not to be heard to set up his own wrong. That seems to me to be the distinction between the two classes of cases. In *Croft* v. *Lumley* (1), the lessor's agent accepted rent accrued due after an alleged forfeiture but insisted that he received the money as compensation for occupation only and not as rent and that he reserved the lessor's right of re-entry. The case came first before the Court of Queen's Bench, who held that the acceptance of the rent was under the circumstances a waiver of the forfeiture. Lord Campbell, who delivered the judgment of the Court, said : " There is an established maxim of law that, where money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him. We see no reason why this maxim should not be applied to the transaction in question." There the lessor did everything he could to preserve his rights but without avail. That case subsequently went to the House of Lords. What took place there is thus summarized in the notes to *Dumpor's Case* (2) in 1 Sm. L. C., 12th ed., at p. 43 : " The question of waiver was submitted, with others, to the judges, and eight out of nine were of opinion that, if there had been a forfeiture, it had been waived by the receipt of the money which had been offered as rent and as rent only. Of the two peers who decided the case Lord Cranworth gave no opinion on the question of waiver, but Lord Wensleydale said he thought it was a question of fact, and not of law, whether the transaction amounted to a payment and receipt of rent, and that he was led to suppose that it did not, as the money was not demanded back when the lessor declared that he would only take it as compensation. His Lordship appeared to be of opinion that the rule Solvitur in modo solventis is only applicable to the case of a payment in respect of one of two debts." This question of waiver was again

(1) 5 E. & B. 648, 680.

(2) (1601) 4 Rep. 119b.

1920

HARTELL v. BLACKLER.

Ballhache J.

raised in *Davenport* v. *The Queen* (1) There a lessee of Crown lands committed a breach of covenant which rendered the lease voidable. The Government with notice of the breach accepted rent which had accrued due after breach, but accompanied their acceptance with a notification that they accepted it without prejudice to their right to insist on a forfeiture. The Privy Council, who found as a fact that the money was not only paid as rent but received as rent, held that under those circumstances the lessor's protest that the acceptance was only conditional was unavailing. They cited the above-quoted passage from the opinion of Williams J. in *Croft* v. *Lumley* (2), but said that they did not find it necessary to invoke that opinion to its full extent, presumably because of their finding of fact that the rent in the case before them had been received as rent. In this state of the authorities I come to the conclusion that if a tenant tenders money as rent accrued due after the expiry of a notice to quit it is not safe for the lessor to receive it if he wants to rely on the notice, even though at the time of the receipt he expressly says that he receives the money not as rent but in some other character. Mr. Murphy attempted to draw a distinction between the case of a forfeiture and that of determination of a tenancy by notice to quit, but I am unable to see that there is any difference in principle between them. In both cases the question is Has the landlord admitted that the tenant remains in occupation as tenant? I think that in this case the judgment of the county court judge was right and that the appeal must be dismissed.

SANKEY J. I agree. I also regret that no counsel appeared to argue the case on the other side, though we have had the advantage of having all the authorities brought to our notice by Mr. Murphy, including those against him as well as those in his favour. This question of waiver by acceptance of rent is one which has agitated the profession for very many years, and it cannot at the present date be said to be definitely

(1) 3 App. Cas. 131. (2) 6 H. L. C. at p. 725.

1920

HARTELL v. BLACKLER.

Sankey J

decided. But having regard to the fact that in *Croft* v. *Lumley* (1), where the facts were identical with those in the present case, eight out of the nine judges who were consulted by the House of Lords were of opinion that acceptance of rent under the circumstances was a waiver of the forfeiture, notwithstanding that the lessor expressly stated, as did the plaintiff's solicitors here, that he accepted the money as compensation for use and occupation and not as rent, and that he refused to recognize the party paying it as his tenant, I think we ought to follow that opinion and hold that the notice to quit has been waived in the present case.

Appeal dismissed.

Solicitors for the appellant: *Law & Worssam, for Elliot Square & Geake, Plymouth.*

J. F. C.

EAGLESHAM *v.* McMASTER.

1920
Feb. 20.

[1918. E. 219.]

Building Contract—Construction—Certificate of Architect—Condition precedent to Right of Action—Arbitration Clause.

Clause 26 of a building contract provided that "the certificate of the architect is a condition precedent to the contractor's right of action against the employer." Clause 27 provided that "the architect is to be the sole arbitrator or umpire between the employer and contractor, and is to determine any question, dispute or difference that may arise either during the progress of the work or in determining the value of any variations that may be made in the work contracted for, and the certificate of the architect's decision upon such question, dispute or difference shall be final and binding between the employer and contractor and without further appeal whatsoever."

The contractor was paid the whole of the amounts which were certified by the architect as due to him; but he alleged that he was entitled to a further sum which he claimed to recover in this action. He had made no application for arbitration under clause 27:—

Held, that the provision of clause 26, making it a condition precedent to the contractor's right of action that he should have the certificate of

(1) 6 H. L. C. 672.

1920

EAGLESHAM v. MCMASTER.

the architect that the amount claimed was due to him was unaffected by clause 27, and that in the absence of a certificate the plaintiff was not entitled to maintain the action unless he could show (and this he failed to show) improper dealing between the employer and the architect.

Robins v. *Goddard* [1905] 1 K. B. 294 and *Lloyd Bros.* v. *Milward* (1895) 2 Hudson's Building Contracts, 262 distinguished.

Clarke v. *Watson* (1865) 18 C. B. (N. S.) 278 followed.

ACTION tried by the Earl of Reading C.J.

The plaintiff claimed 707*l.* 18*s.* 7*d.*, being the balance alleged by him to be due for work done and materials supplied in and about the erection of a town hall at Girvan, Ayrshire, which the defendant agreed to present to the burgh.

By a contract dated June 26, 1909, the plaintiff undertook to carry out the joinery work in connection with the erection of the town hall.

The following were the material clauses of the contract :—

"23. The amount of the contract money is to be paid to the contractor upon the architect's certificate by instalments in sums of not less than 200*l.*, such instalments to bear a ratio of 80 per cent. in value in the architect's opinion of work executed."

"25. Of the balance of the contract money 50 per cent. is to be paid (upon the architect's certificate) within one month after the receipt of a certificate from the architect of the complete performance of the works; 25 per cent. is to be paid (upon the architect's certificate) within three months after receipt of above certificate, and the remaining 25 per cent. will be paid (upon the architect's certificate) twelve months after receipt of such certificate of completion, providing any defects that may appear in the building and works within that time have been remedied and made good by the contractor. . . . . "

"26. The certificate of the architect is a condition precedent to the contractor's right of action against the employer."

"27. The architect is to be the sole arbitrator or umpire between the employer and contractor, and is to determine any question, dispute or difference that may arise either during the progress of the work or in determining the value of

any variations that may be made in the work contracted for, and the certificate of the architect's decision upon such question, dispute or difference shall be final and binding between the employer and contractor and without further appeal whatsoever."

The plaintiff alleged that the total amount payable to him in respect of the work and material supplied was 4,310*l.* 16*s.* 4*d.*, and after giving credit for 3,602*l.* 17*s.* 9*d.* paid by the defendant the plaintiff now claimed the balance of 707*l.* 18*s.* 7*d.*

By his defence the defendant said that nothing was due by him to the plaintiff, as the value of the work done and materials supplied did not exceed 3,602*l.* 17*s.* 9*d.*, which sum had been paid. The defendant also pleaded as follows (para. 6): "The plaintiff has not obtained a certificate of the architect in respect of the sum sought to be recovered in this action or any part thereof. Certificates have been made by the architect for sums amounting in the aggregate to the sum of 3,602*l.* 17*s.* 9*d.* and no more, and the full amounts payable under all certificates so made by the architect as aforesaid were satisfied by the defendant before this action was brought."

By his reply the plaintiff said (para. 3): "The defendant is precluded from relying on the conditions pleaded in that the said architect acted as agent of the defendant and/or acted in the interests of the defendant alone and/or failed to carry out his duty as an arbitrator." In his particulars the plaintiff alleged, inter alia, that the final measurement by the architect was not in accordance with the Glasgow mode or in conformity with the original method adopted in the original schedule; that the prices had been wrongly varied by the architect; that work done by the plaintiff had been omitted by the architect; that the amounts allowed were in many cases improper and unreasonable; and that the architect arbitrarily fixed the amount for which he issued certificates, and refused to consider the plaintiff's objections thereto.

On an application in chambers the judge made the following order: "It being agreed by counsel on both sides that if the points of law raised by paras. 6 and 7 (1) of the defence

(1) Para. 7 of the defence relied upon a judgment in Scotland as an

1920

EAGLESHAM v. MCMASTER

be decided against the defendant the defendant undertakes to admit liability and to consent to judgment for such sum (if any) as shall be found due from him to the plaintiff . . . . it is ordered that the points of law raised by paras. 6 and 7 of the defence be tried before the question of amount (if any) due to the plaintiff."

By a letter dated February 5, 1920, the plaintiff's solicitors wrote to the defendant's solicitors intimating that the plaintiff in addition to the particulars set out in para. 3 of the reply would also rely on the following: "That the architect gave defendant an estimate and/or an undertaking as to the cost of the proposed town hall; that prior to the giving of the final certificate such cost was exceeded; that requests and/or instructions were given by the defendant to the architect in connection with the granting of certificates and execution of the work; that communications passing between the defendant and the architect were not disclosed to the plaintiff."

Zeffertt for the plaintiff. The plaintiff is entitled to maintain this action notwithstanding that he has not obtained the architect's certificate that the amount sued for is due. Clause 26 of the contract purports to make the obtaining of the architect's certificate a condition precedent to the contractor's right of action, but the finality of the certificate is destroyed by clause 27, which makes the architect the arbitrator of all disputes arising out of the contract.

[EARL OF READING C.J. Was any application made to the architect to act as arbitrator?]

No. That, however, does not affect the construction of the contract. In *Robins* v. *Goddard* (1) Collins M.R. said (2): "If something which purports to be conclusive is made subject to revision, it loses its quality of finality. That is the case here, where the decision of the architect is made subject to the decision of an arbitrator. A person who agrees to arbitrate upon any matter is not, unless the award of an

estoppel, but as this point was not argued it is not considered necessary to set out the paragraph.

(1) [1905] 1 K. B. 294.
(2) Ibid. 301.

arbitrator is made a condition precedent to the bringing of an action, debarred from pursuing his common law right to bring an action, subject to this—that upon proper steps being taken a direction might be obtained that the case, instead of being tried in an action, should go before the arbitrator." Here, no application to stay the action was made by the defendant. See also *Lloyd Bros.* v. *Milward* (1), where the arbitration clause was spoken of by Lord Esher M.R. as in the nature of a proviso on the clause making the architect's certificate final and conclusive. Even if the plaintiff's construction of the two clauses is wrong, the defendant is precluded from relying on the absence of the architect's certificate by reason of the allegations in para. 3 of the reply. It is not necessary to show fraud or collusion between the defendant and the architect; something much less will suffice—e.g., the non-observance by the architect of that attitude of judicial independence which is required of him: *Hickman & Co.* v. *Roberts*. (2) If necessary, the plaintiff asks leave to rely on the additional particulars set out in his solicitors' letter of February 5, 1920.

Barrington-Ward K.C. and *A. E. Woodgate* for the defendant. This action is not maintainable in the absence of the architect's certificate: *Scott* v. *Liverpool Corporation* (3); *Sharpe* v. *San Paulo Railway Co.* (4); and *Smith* v. *Howden Union Rural Sanitary Authority*. (5) No doubt improper dealings between the employer and the architect would be an answer to the absence of the certificate: *Hickman & Co.* v. *Roberts* (2), where a case of collusion between the appellants and their architects was set up. No case of improper dealing is alleged in para. 3 of the reply. As Willes J. said in *Clarke* v. *Watson* (6) consistently with these allegations the only wrong (if any) the architect has been guilty of may be an error of judgment; and that does not affect the defendant. *Robins* v. *Goddard* (7), relied upon by the plaintiff, does not support his contention.

(1) 2 Hudson's Building Contracts, 262.
(2) [1913] A. C. 229.
(3) (1858) 28 L. J. (Ch.) 230.
(4) (1873) L. R. 8 Ch. 597, 612.
(5) (1890) 2 Hudson's Building Contracts, 156, 162.
(6) 18 C. B. (N. S.) 278, 285.
(7) [1905] 1 K. B. 294.

1920

EAGLESHAM v. MCMASTER.

There, as Stirling L.J. pointed out, the architect's certificates were not intended to be absolutely binding and conclusive. In that action, too, it was the contractor who was suing upon a certificate he had obtained; it was for him to show that it was conclusive, and he failed. Further, the architect was not the arbitrator in that case.

Zeffertt in reply referred to *In re Hohenzollern Actien Gesellschaft für Locomotivbau and City of London Contract Corporation.* (1)

EARL OF READING C.J. This action comes before me upon an order made by the judge in chambers for decision upon points of law. As drawn up the order does not truly express what the parties wished, but they have stated to me their view, and I take it that what they desire is that the case should be dealt with upon the materials at present before the Court—the pleadings and the application by the plaintiff to amend—leaving any question of amount to be considered by an official referee.

[His Lordship stated the facts and continued:] On the construction of the contract, I come to the conclusion, having regard to clauses 25, 26 and 27, that the parties intended that the plaintiff should only be entitled to recover if he had a certificate of the architect. The language of clause 26 is very strong. For the plaintiff, however, it has been argued with great ingenuity that clause 26 is really disposed of by clause 27 because the latter clause says that the architect is to be the sole arbitrator between the employer and contractor, and is to determine any question, dispute or difference that may arise between them during the progress of the works, etc., and his decision is to be final and binding. Mr. Zeffertt contends that clause 27 destroys the effect of clause 26, and that he brings himself within the decision in two cases. Clause 27 in my view still leaves clause 26 in operation and makes it necessary that the plaintiff should have a certificate before he can recover, but clause 27 does not leave it to the architect to make his certificate without hearing the parties and adjudicating upon

(1) (1886) 2 Hudson's Building Contracts, 100.

any dispute that may arise between them. Reading the two clauses together I am of opinion that their true meaning is that the certificate must be obtained before the plaintiff can sue for payment. It is not the Court which says that the plaintiff shall not come before it except upon production of a certificate; the parties themselves have so agreed. The object of the clauses is to leave these matters to a person who has expert knowledge of building work and has the confidence of both parties, and the plaintiff was content to enter into the contract upon that footing.

My view of the construction of the contract being that which I have expressed, is there anything in the authorities cited to induce me to change that opinion? I can find nothing in them to alter my view; indeed they tend to confirm it. Mr. Zeffertt for the plaintiff relied upon *Robins* v. *Goddard* (1) and *Lloyd Bros.* v. *Milward* (2) as supporting his contention that where there is a clause providing that the obtaining of the architect's certificate shall be a condition precedent to the contractor's right of action against the employer, and also a clause providing that in the event of a dispute there shall be an arbitration by the parties the latter clause destroys the finality of the architect's certificate and leaves any dispute to be decided not by the architect's certificate but in arbitration proceedings. In both the cases relied upon for this contention it is important to observe that the arbitrator was not the architect whose certificate was to be obtained, but another person either designated or to be appointed for the purpose, so that what was to happen, according to the construction put upon the contracts there in question, was that prima facie the architect's certificate was final, and if the contractor obtained it he was entitled to be paid, but if either the contractor or the employer disputed it the matter must be referred to arbitration. The Court said that where the certificate was not final it must be dealt with under the arbitration clause, and then, upon principles well established, the Court would decide whether the case should

(1) [1905] 1 K. B. 294.

(2) 2 Hudson's Building Contracts, 262.

1920

EAGLESHAM v. MCMASTER.

Earl of Reading C. J.

be proceeded with or not. It is also worthy of note, as Mr. Barrington-Ward pointed out, that in *Robins* v. *Goddard* (1) the action was by the contractor against the building owner to recover sums due on certificates which had been issued by the architect. The employer set up as a defence and counterclaim the defective character and unsuitability of the work done and materials supplied. The Court of Appeal held that the certificates were not conclusive because of the wide terms of the arbitration clause, and therefore that the employer was entitled to set up his defence and counterclaim. That case does not affect the principle to which I propose to give effect. In the other case cited by Mr. Zeffertt. *Lloyd Bros.* v. *Milward* (2), the contract provided that a certificate of the architect showing a final balance due or payable to the contractor was to be conclusive evidence that the work had been duly completed and that the contractor was entitled to receive payment; but by another clause it was provided that in case any question, dispute or difference should arise between the proprietor, or the architect on his behalf, and the contractor as to, inter alia, the works having been duly completed, the matter was to be referred to the arbitration of a third person. The architect gave a certificate showing the final balance due to the contractor, but a dispute had arisen before the signing of that certificate, and the certificate was accordingly held not to be conclusive. That case does not affect the view which I have expressed. On the other hand I am confirmed in my view by the decision in *Clarke* v. *Watson*. (3) There it was made perfectly plain that where there is an agreement of this kind by which it is necessary for the contractor to have a certificate of the surveyor the Court cannot entertain an action by him where he has not obtained such a certificate. It was alleged by the contractors in that case that all things necessary had been done by them to entitle them to have the surveyor's certificate that the work had been duly and efficiently performed and completed to his satisfaction, but that the surveyor had not given the certificate and had

(1) [1905] 1 K. B. 294.

(2) 2 Hudson's Building Contracts, 262.

(3) 18 C. B. (N. S.) 278, 285.

wrongfully and improperly neglected and refused so to do. It was held on demurrer that, in the absence of collusion, the plaintiffs were not entitled to recover without producing the surveyor's certificate, nor were the defendants responsible for the refusal of the surveyor to give one. Willes J. said: "Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment; or he may have refused to exercise any judgment; in which case, the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty."

Having arrived at the construction of this contract already expressed the plaintiff must fail in the action unless he can show that there was some wrong act done by the defendant entitling him, the plaintiff, to proceed notwithstanding that he has not obtained the architect's certificate. Such a wrong would be fraud or collusion between the defendant and the architect, or some moral turpitude amounting to improper conduct which would lead the Court to interfere. There must be something in the nature of improper conduct by the defendant before the Court can ignore the contract and say that the plaintiff may proceed notwithstanding the absence of the certificate. *Clarke* v. *Watson* (1) shows this quite clearly. The mere fact that the architect may have been guilty of an error of judgment by not applying his mind sufficiently to the question raised, or that he gave a wrong judgment are immaterial matters for this purpose. The Court cannot consider them unless the plaintiff has shown a ground for attacking the defendant with regard to the architect's certificate, and that is where the plaintiff fails. In *Hickman & Co.* v. *Roberts* (2) it was said that where improper conduct was shown, for example, if the architect was acting in the interests of one party by his direction, that would render his acts invalid. If in this case it had been shown that the defendant had given instructions to the architect as to the amount for which he should certify, or as to the decision at which he ought to arrive upon any particular matter, there

(1) 18 C. B. (N. S.) 278. (2) [1913] A. C. 229.

1920

EAGLESHAM v. McMASTER.

Earl of Reading C. J.

would be sufficient to override the necessity for obtaining the certificate and the plaintiff would be entitled to proceed without it. But that is what is absent in this case. There is no allegation that the defendant did anything wrong. The allegation in para. 3 of the reply is that the defendant is precluded from relying on the conditions pleaded in that the architect acted as agent of the defendant and/or acted in the interests of the defendant alone and/or failed to carry out his duty as an arbitrator. I can find nothing there which amounts to more than an allegation that the architect has committed some error of judgment by failing to take into account something which the plaintiff thinks he should have considered. Nowhere can I find in the particulars any allegation against the defendant. All the allegations are against the architect. Neither fraud nor collusion nor improper conduct on the part of the defendant is alleged; all that is said is that the architect has done things which he ought not, and has omitted to do things which he ought, to have done. That being so, sufficient has not been shown to entitle the plaintiff to proceed with the action in view of the conditions of the contract.

Mr. Zeffertt then asked for leave to amend. But at this very late stage I cannot allow an amendment of the pleadings to raise an answer involving serious reflections upon the propriety of the defendant's conduct. I find that the defence is established, and the action will therefore be dismissed.

Judgment for defendant.

Solicitors for plaintiff: *Woodthorpe, Browne & Co.*

Solicitors for defendant: *Kingsford, Dorman & Co., for Kingsford, Arrowsmith & Wightwick, Canterbury.*

J. S. H.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* CHARLES EDWARD WOOD.

1920
March 1.

Criminal Law—Evidence—Character of Defendant—Evidence of previous Conviction—Offence later than that for which Defendant is on trial—Admissibility—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (ii).

Under s. 1 (*f*) (ii) of the Criminal Evidence Act, 1898, a person charged with an offence and called as a witness, who has given evidence of his own good character, may be asked and required to answer a question tending to show that he has been convicted of an offence other than that with which he is then charged, notwithstanding that that other offence was committed subsequently to the offence with which he is then charged.

APPEAL from conviction and sentence at Middlesex Sessions.

The defendant, Wood, a discharged soldier, was charged on an indictment containing two counts: (1.) That on November 29, 1919, in the parish of Enfield, Middlesex, he indecently assaulted Annie Maria Stapleton; and (2.) that on the same day in the same parish he indecently assaulted Mary Norma Whalley.

On February 7, 1920, the case came on for trial at Middlesex Sessions, and the defendant pleaded not guilty to both counts. The trial of the first count was then proceeded with, when it was proved that the offence to which that count related was committed as alleged at about 8 P.M. on the day in question; and the jury found the defendant guilty on that count.

On February 9, 1920, the second count was tried with another jury. It was proved that the offence to which that count related was committed as alleged at about 7 P.M. on the day in question. The defendant's counsel asked questions of a witness for the prosecution to show that the defendant was of good character. Counsel for the prosecution thereupon elicited from the defendant in cross-examination and also from other witnesses evidence of his previous

1920

THE KING v. CHARLES EDWARD WOOD.

conviction for the offence charged on the first count. The jury found the defendant guilty on the second count.

The defendant was thereupon sentenced to seven months' imprisonment with hard labour on each count, the sentences to run consecutively.

The defendant appealed against the convictions and the sentences.

One of the grounds of his appeal against the conviction for the offence charged in the second count was that at the trial for that offence evidence of his previous conviction for the offence charged in the first count was not properly admissible under the Criminal Evidence Act, 1898, s. 1 (*f*) (ii.) (1), seeing that the last-mentioned offence took place after that for which he was then being tried.

F. J. Newman for the defendant, appellant. The conviction of the defendant for the offence charged in the second count is bad and should be quashed on the ground that at his trial for that offence evidence was improperly admitted of his previous conviction for the later offence charged in the first count.

The Criminal Evidence Act, 1898, s. 1 (*f*) (ii.) (1), on its true construction means that a person charged with an offence and called as a witness, who has asked questions of the witnesses for the prosecution with a view to establish his own good character, may be asked questions tending to show that he has been convicted of an offence other than that with which he is then charged, if that other offence

(1) Criminal Evidence Act, 1898, s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:

"(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless— . . . .

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character; . . . ."

was committed before, but not if it was committed after the offence with which he is then charged. One of the objects of the section is to prevent a defendant from being prejudiced by evidence as to his past character unless he has himself put it in issue by asking the questions referred to, and it cannot be supposed that the clause in question enables the prosecution to cross-examine the defendant as to an offence later than that with which he is charged.

[DARLING J. The clause enables the prosecution to ask the defendant any question tending to show that he "is" of bad character as he stands in the witness-box.]

The fact that the defendant has been convicted of a subsequent offence is not evidence that he was of bad character at the time when the earlier offence with which he is now charged was committed. In the present case the defendant was of unimpeachable character down to the time of the offence charged in the second count.

A witness to the good character of a prisoner cannot be cross-examined as to circumstances of suspicion against the prisoner which occurred after the offence with which he is charged was committed: *Reg.* v. *Rogan and Elliott.* (1)

G. D. Roberts (*Roland G. Oliver* with him) for the Crown.

The judgment of the Court (Earl of Reading C.J., Darling and Sankey JJ.) was delivered by

EARL OF READING C.J. In my opinion the evidence as to the previous conviction of the defendant was properly admitted. The meaning of the material provisions of the Criminal Evidence Act, 1898, is plain. Sect. 1 of the Act for the first time provides that a person charged with an offence shall be a competent witness for the defence and entitled to give evidence on his own behalf. The object of proviso (*f*) to the section is to prevent the defendant when he goes into the witness-box from being prejudiced by the cross-examination as to character which is admissible for the purpose of testing the credibility of an ordinary witness, and to give him the benefit of a trial in which nothing

(1) (1846) 1 Cox C. C. 291.

1920

THE KING v. CHARLES EDWARD WOOD.

affecting his past character shall be brought up against him. That proviso, however, is of course subject to the condition mentioned in sub-cl. (ii.) thereunder, that the person charged has not asked questions of the witnesses for the prosecution or given evidence with a view to establish his own good character, and so put his own character in issue in the course of the case. If the defendant endeavours to show that he is of good character when he is in fact of bad character, he presents a false view of the case, and the prosecution are not only entitled but bound to do what they can to prove to the jury that he ought not to be placed upon the high pedestal which he desires to occupy.

In the present case, at the trial of the defendant, on the second count he endeavoured to establish his own good character, whereupon the prosecution subjected him to cross-examination and obtained from him an admission of his previous conviction on the first count.

It is now said that that evidence ought not to have been admitted, because although the first count was tried first the offence charged in that count had in chronological order taken place after the offence for which the defendant was then being tried on the second count. In the opinion of the Court the fact that the previous conviction related to a later offence than that for which the defendant was then being tried did not disentitle the prosecution to cross-examine him in regard to it or render it any the less admissible as evidence tending to show that he was not of good character at the time of the second trial. The defendant's appeal against his convictions must be dismissed. (1)

Solicitors for appellant: *Breeze & Wyles, Cheshunt and London.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) The Court reduced the sentence on grounds which it is not material to mention.

J. R.

[IN THE COURT OF CRIMINAL APPEAL.]

C. A.
1920
March 15.

THE KING *v.* JAMES PAUL.
THE KING *v.* ROBERT McFARLANE.

Criminal Law — Evidence — Prisoners jointly indicted — Evidence by One Prisoner—Right of Prosecution to cross-examine to incriminate Another Prisoner—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1.

Where a prisoner jointly indicted with another prisoner goes into the witness-box and is sworn as a witness for the defence he may be cross-examined by counsel for the prosecution even although the only statement that he makes in the witness-box is that he is guilty.

A prisoner who is called as a witness for the defence may be cross-examined by counsel for the prosecution in order to incriminate another prisoner charged jointly with him.

APPLICATIONS for leave to appeal against conviction and sentence.

The appellants, Paul and McFarlane, were charged at the Central Criminal Court jointly with three other persons with breaking and entering a warehouse and stealing therein divers furs of the value of 3000*l.* A number of men broke into the warehouse and took away the furs in a motor lorry. The two appellants were recognized by police officers who were on the watch as being among the men concerned in the robbery. The defence set up by the two appellants was an alibi, and evidence was given in support of that defence.

Near the end of the trial the Recorder told one of the prisoners, named Goldberg, that he was not bound to give evidence upon oath unless he wished, but that if he wished to go into the witness-box and give evidence he could do so. Goldberg thereupon went into the witness-box, and, after having been sworn, said that he pleaded guilty, and had nothing more to say. Goldberg was then cross-examined by counsel for the prosecution, and in the course of the cross-examination said that the two appellants were present at the robbery; that they, in fact, arranged it; that they sold the stolen furs; and that they shared the proceeds among the men concerned in the robbery. No objection was taken at

C. A. 1920

THE KING v. JAMES PAUL.

THE KING v. ROBERT MCFARLANE.

the time to the cross-examination. The jury found both the appellants guilty, and they were sentenced to five years' penal servitude.

St. John McDonald for the appellants. Under s. 1 of the Criminal Evidence Act, 1898, a person charged with an offence is a competent witness for the defence. But when the only evidence that the accused person gives is to say that he is guilty, the prosecution have no right to cross-examine him, as there is no issue before the Court. If the accused person gives evidence he may be cross-examined as regards that evidence, but the cross-examination must not be conducted with a view of establishing the guilt of another person charged jointly with him, as an accused person is a competent witness for the defence only, and not for the prosecution : see Manual of Military Law, 6th ed., chap. vi., s. 84.

[AVORY J. It was held in *Rex* v. *McDonell* (1) that one of two prisoners charged jointly in the same indictment who gave evidence on behalf of the other prisoner was a competent witness for the defence. In *Rex* v. *Hadwen* (2) two prisoners were jointly indicted, and one gave evidence under the Act of 1898 incriminating the other. It was contended that he could only be cross-examined by counsel for the prosecution, and not by the other prisoner, but the Court held that he could be cross-examined on behalf of the other prisoner.]

A prisoner who goes into the witness-box and gives evidence can be cross-examined as regards that evidence, but not as regards the guilt of a person charged jointly with him, but he may be cross-examined by a co-prisoner in order to show the innocence of that prisoner. The fact that Goldberg was cross-examined so as to incriminate the appellants vitiates their conviction.

The judgment of the Court (Earl of Reading C.J., Bray and Avory JJ.) was delivered by

EARL OF READING C.J. The main point raised in this appeal is that counsel for the prosecution ought not to have

(1) (1909) 73 J. P. 490. (2) [1902] 1 K. B. 882.

C. A.
1920
THE KING
v.
JAMES PAUL.
THE KING
v.
ROBERT McFARLANE.
Earl of Reading C.J.

been allowed to cross-examine Goldberg after he had pleaded guilty, and that the cross-examination having been allowed, the conviction is vitiated, and the appeal ought to be allowed. The argument is based upon s. 1 of the Criminal Evidence Act, 1898. It is said that although that Act makes a prisoner a competent witness for the defence, if the prisoner goes into the witness-box and says that he is guilty he cannot be cross-examined by the prosecution as the issue is then dead. That contention is, however, based upon a fallacy. When a prisoner goes into the witness-box to give evidence for the defence and has been sworn he is in the same position as an ordinary witness, and therefore subject to cross-examination. It is immaterial whether he stands mute or whether he gives evidence for the defence or for the prosecution. It is not what he says in the witness-box that subjects him to cross-examination, but the fact that he is called as a witness for the defence. As soon as a prisoner goes into the witness-box as a witness for the defence and is sworn counsel for the prosecution is entitled to cross-examine him. It has also been contended that counsel for the prosecution is not entitled to cross-examine a prisoner called as a witness for the defence so as to incriminate a prisoner charged jointly with him. That contention is a novel one; no case has been cited in support of it, and it is also contrary to the usual practice, and in the opinion of the Court it entirely fails. There is no ground for giving leave to appeal against the conviction. Having regard to the circumstances of the case, the Court cannot say that the sentence of five years' penal servitude is too severe.

Appeal dismissed.

Solicitor for appellants: *Bruce Searl.*

R. F. S.

1920
March 17.

GOULD *v.* SOUTH EASTERN AND CHATHAM RAILWAY COMPANY.

Railway Company—Goods delivered for Carriage improperly packed—Knowledge of Company—Liability for Damage due to defective Packing.

Where goods are delivered to a common carrier for carriage insufficiently packed, and are damaged in the course of the transit, the carrier's knowledge of their condition at the time of their receipt will not preclude him from setting up as a defence that the damage was due to the insufficient packing.

APPEAL from the Southwark County Court.

In September, 1919, the plaintiff, who was then carrying on business at Ramsgate, was desirous of removing to London. He accordingly wrote to the defendants requesting them to send and collect his goods for carriage on their railway. They sent a carman named Perry with a van, and on his arrival at the plaintiff's premises the plaintiff asked him for a form of consignment note. Perry had not got one, but said he could make a consignment note on anything. The plaintiff then made on a postcard a list of the goods, which consisted of seven packages, including a glass showcase, wrote on it his name with the address to which the goods were to be sent, together with the words "Carriage forward," and handed it to Perry. Perry pointed out to him that the showcase was improperly packed, and told him that being glass it would probably have to be paid for at a higher rate than the other goods. Thereupon the plaintiff asked him "to do his best" for him, which Perry understood to mean that the plaintiff wished him to fill up and sign for him the form of consignment note which was applicable. Perry took the goods away in the van, and on arriving at the railway station filled up a printed form of consignment note with the list of goods to be carried and signed it with the plaintiff's name. The form bore the heading "Consignment note for damageable goods when not properly protected by packing, at owners' risk," being the only form that the company have applicable to that class of goods.

During the transit to London the showcase was damaged, and for that damage the present action was brought.

For the defendants it was contended that (1.) the consignment note so signed by Perry in the plaintiff's name and consigning the goods "at owners' risk" was binding on the plaintiff as being a special contract signed by the owner within s. 7 of the Railway and Canal Traffic Act, 1854; and (2.) that even if the goods were carried by them as common carriers and not at owners' risk they were not responsible for the damage which was caused by the plaintiff's neglect to pack them properly.

The county court judge with regard to the first defence held that there was not sufficient evidence of Perry's authority to sign an owners' risk note on the plaintiff's behalf, and that consequently the goods must be treated as having been carried by the defendants as common carriers. On the second defence he held that even if the showcase was damaged as the result of insufficient packing it was a good answer that the defendants knew of the insufficiency at the time they received the goods for carriage; and for that he relied on a ruling of Lord Ellenborough in *Stuart* v. *Crawley*. (1) He accordingly gave judgment for the plaintiff.

The defendants appealed.

C. Ince for the defendants. The proper inference from the facts is that Perry had the plaintiff's authority to sign the note. There is no objection to a special contract under the Act of 1854 being signed by a common agent of both consignor and railway company: *Aldridge* v. *Great Western Ry. Co.* (2) The plaintiff's instructions were ambiguous, and Perry was entitled to do the best he could under the circumstances. The alternative to his not consigning the goods at owners' risk was that they would not have been carried at all. But even if there was no special contract, still the defendants are not liable owing to the condition in which the showcase was delivered to them. In *Hart* v. *Baxendale* (3), where a marble

(1) (1818) 2 Stark. 323. (2) (1864) 15 C. B. (N. S.) 582.
(3) (1867) 16 L. T. 390.

1920

GOULD v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANY.

topped washstand was damaged during carriage in consequence of being badly packed, Martin B. directed the jury: "A carrier is an insurer and bound to deliver goods committed to him safely, the Act of God and Queen's enemies excepted. But there is a condition precedent, that the goods if liable to be broken shall be properly and carefully packed." The county court judge has held that the bad packing afforded no defence in view of the fact that the defendants knew of it; and for that he relied on *Stuart* v. *Crawley* (1), where a dog was handed to a carrier for carriage without any collar and with a cord round its neck so insufficiently secured that after the carrier had accepted the custody the dog escaped and was lost. Lord Ellenborough held that as the carrier had the means of seeing that it was insufficiently secured he was responsible, and he distinguished the case of "a delivery of goods imperfectly packed, since there the defect was not visible." But that case is inconsistent with the later decision in *Barbour* v. *South Eastern Ry. Co.* (2) There furniture was delivered to the defendants improperly packed, and was damaged in consequence in the course of the carriage. It was held that as it was the owner's duty to pack the goods and he chose to have them go in an unsafe condition he could not complain if they were damaged as the result of that condition, and that it made no difference that the defendants were aware of it. Cleasby B. expressly pointed out that "the goods were delivered in a manifestly unsafe condition," that is to say, that it was known to the defendants; and Field J. pointed out the same thing. *Stuart* v. *Crawley* (1) was there referred to in the plaintiff's argument, but no attention was paid to it in the judgments.

Bickmore for the plaintiff. There was no evidence on which the county court judge could find an authority to Perry to fill up an owners' risk note. If there was authority to fill up a consignment note at all it was to do so on the ordinary terms, the goods being carried by the defendants as common carriers. On the other point, the defence that the damage was due to insufficient packing cannot be relied on, as the defendants

(1) 2 Stark. 323. (2) (1876) 34 L. T. 67.

took the goods with notice of their condition. *Stuart* v. *Crawley* (1) is good law. In *Richardson* v. *North Eastern Ry. Co.* (2) it was referred to by Willes J. without any disapproval and distinguished. That also was the case of a dog delivered for carriage to a railway company. At the time of delivery it had on an ordinary leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the dog from one train to another, it was temporarily fastened by the strap to an iron spout on the platform of the station, and while so fastened it slipped its head out of the collar, got on the line and was killed. It was held that the defendants were not liable, as the collar was in fact unsafe and therefore it was negligent in the consignor to deliver it in that condition, but the unsafety was not apparent to the defendants. Willes J. distinguished *Stuart* v. *Crawley* (1) upon the ground that in that case "when the dog was delivered to the defendant's servant he had the means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted, viz., by a collar and strap."

Ince was not called on to reply.

ATKIN L.J. This is an appeal from the judge of the Southwark County Court, who gave judgment for the plaintiff in an action brought against a railway company for damage done to a showcase which was damaged while in transit on their railway from Ramsgate to London. The first defence of the railway company is that the case was carried at owners' risk upon a special contract made in pursuance of s. 7 of the Railway and Canal Traffic Act, 1854. That contract was contained in a consignment note which purported to be signed by the plaintiff. His signature however was in fact affixed by a vanman named Perry in the employment of the defendants, and the question is whether he had the authority of the plaintiff to sign on his behalf. That depends upon the proper conclusion to be drawn from the facts. [His Lordship stated the facts as above set out.] The plaintiff was unable to determine how or on what terms the goods should be carried; he knew

(1) 2 Stark. 323. (2) (1872) L. R. 7 C. P. 75.

1920

GOULD v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANY.

Atkin L. J.

there might be some objection to their being carried at all, or certainly to their being carried at the company's risk, and he left it to Perry to do the best he could for him. It seems to me plain that the authority he gave to Perry was expressed in such ambiguous terms that Perry might reasonably suppose he had authority to sign a consignment note on the terms of owners' risk, and under those circumstances the plaintiff could not be heard to say that he had not given Perry the authority which Perry thought he had. If there is any necessity for an authority for that proposition I may refer to *Ireland* v. *Livingston*. (1) It seems to me that the only way in which Perry could do his best for the plaintiff to get the goods conveyed at all was to consign them on an owners' risk note. The idea that a railway company would carry imperfectly packed goods at company's risk is inconceivable, and I am compelled to the conclusion that Perry had in fact the plaintiff's authority to procure the goods to be carried at owners' risk.

That is sufficient to dispose of the case. But let us assume that I am wrong in holding that Perry had authority to make the special contract on the plaintiff's behalf. There remains for consideration the other point which was discussed before us—namely, whether the defendants, assuming that they carried the showcase on the terms of the liability of common carriers, are precluded from setting up as a defence that the damage was due to improper packing because they carried it with full knowledge of its condition. The county court judge held that as the carriers were aware of the condition of the packing at the time they received the article they could not disclaim their liability as insurers. That raises an important and interesting question of law. Now the rule as to the obligation of a common carrier is thus stated in Story on Bailments, § 492 *a*: "Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the Act of God, or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the

(1) (1871) L. R. 5 H. L. 395.

course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carriers' implied obligations do not extend to such cases." That passage is cited by Willes J. in *Blower* v. *Great Western Ry. Co.* (1) as an accurate statement of the law, and, being so approved, is a sufficient authority for me to act upon without more. Now does it make any difference that the faulty packing which caused the damage was manifest to the carrier at the time that the goods were delivered to him to be carried? By analogy to the exception of inherent vice it would seem that it does not. The inherent vice or natural tendency of certain kinds of goods to depreciate or become damaged may be perfectly apparent to the carrier, and in most cases would be quite apparent when he received the goods, nevertheless he is not responsible for the damage resulting from such cause, and it appears to me that there is no reason for treating the exception of damage caused by defective packing in any different way. But the case is not without authority, because in *Barbour* v. *South Eastern Ry. Co.* (2) a similar question arose. There the plaintiff wanted to send furniture by the defendants' railway. He made inquiries of the defendants for rates, and the defendants when quoting their rates informed the plaintiff that one of the conditions of the carriage was that they were not to be responsible for damage if the goods were not properly packed. The goods, which had been lying at a depository,

(1) (1872) L. R. 7 C. P. 655. (2) 34 L. T. 67, 68.

1920

GOULD v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANY.

Atkin L.J.

were eventually carried by the defendant's railway, and owing to insufficient packing they were damaged. The facts are thus stated in the judgment of Cleasby B.: "At the depository where this furniture was there were haybands and matting at hand which might have been used for the purpose of protecting it, but the plaintiff deliberately chose not to make it safe. The carman could not use the haybands, because had he done so he would have been acting in violation of the company's regulations. The plaintiff, therefore, voluntarily left them in the condition they were in, and by doing so took upon himself the risk of anything happening to them. The real question is, whose duty was it to pack? No doubt it was the plaintiff's duty to pack. What caused the damage? Why, it was occasioned by the furniture not being properly packed. No person is entitled to claim compensation from others for damage occasioned by his neglect to do something which it was his duty to do." Further on he says: "But here the goods were delivered in a manifestly unsafe condition, and, as I have said before, the plaintiff chose to have them go in the condition they were in, and the damage was the consequence. I think therefore he is not entitled, under the circumstances, to recover." And Field J. says the same thing: "I also think the county court judge was quite right in the conclusion he arrived at in this case. I base my judgment entirely on the finding in the case, that the damage complained of was caused by improper packing." Now there is a case where goods were handed to common carriers, they were manifestly in an unsafe condition, the damage arose from their being in that condition, and it was held that the plaintiff could not recover. The facts in the present case are precisely the same, and the same result must follow. The only doubt that has been thrown upon this proposition arises from a case of *Stuart* v. *Crawley*. (1) There the plaintiff's servant took a valuable greyhound with a string round his neck to the warehouse of the defendant, a carrier, to be carried from London to Harefield Lock. The defendant's bookkeeper to whom the dog was delivered gave a receipt for it. The dog was tied by the string in a watch box, but shortly

(1) 2 Stark. 323, 324.

after slipped from the noose and was not afterwards heard of. Lord Ellenborough held that the defendant was responsible. He said: "The case was not like that of a delivery of goods imperfectly packed, since there the defect was not visible, but in this case the defendant had the means of seeing that the dog was insufficiently secured. . . . . After a complete delivery to the defendant, he became responsible for the security of the dog, the property then remained at the risk of the defendant, and he was bound to lock him up, or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for its security." It appears to me that that case is sufficiently supported by the consideration that even if goods are delivered to a carrier imperfectly packed the carrier is nevertheless under an obligation to take reasonable care of them in that state, and the judge there was of opinion that the defendant in only availing himself of the meagre means of confining the dog provided by the plaintiff was not discharging his duty of taking proper care of it, and was therefore liable. That case is I think no authority for the proposition that where goods are handed to a common carrier imperfectly packed he accepts full responsibility if he knows that that is the case. If it is an authority for that it seems to me inconsistent with *Barbour* v. *South Eastern Ry. Co.*, (1) and I doubt much whether Lord Ellenborough meant to lay down any such proposition of law. In my opinion the defendants' knowledge of the improper packing in the present case did not make them responsible, and the plaintiff, even if he is right in his first contention, still cannot recover. The appeal must be allowed and judgment entered for the defendants.

YOUNGER L.J. I am of the same opinion on both points. When one considers the conversation that took place between the plaintiff and Perry with reference to the absence of a consignment note it seems abundantly clear that the plaintiff authorized Perry to make out a proper consignment note on

(1) 34 L. T. 67.

1920

GOULD v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANY.

Younger L.J.

his behalf with respect to these goods, and further I think the inference is irresistible that the consignment note so authorized was, as Perry himself inferred, to be a note at owners' risk. I should myself have thought so even if the goods had been consigned to some person other than the plaintiff. But here they were consigned to the plaintiff himself carriage forward; they were received by him, and he paid for them without objection at owners' risk rate. It seems to me that the plaintiff both authorized Perry at the beginning of the transaction to consign the goods for him at owners' risk, and at the end of the transaction he ratified Perry's action by accepting the terms on which they had in fact been carried.

With regard to the second point, while accepting with deference what my Lord has said on the question of law arising on this branch of the case, I will pass it by for the moment to point out that the plaintiff's contention is not supported by the facts. I will assume that Mr. Bickmore's contention is right that a railway company are not absolved from responsibility for the safe carriage of goods imperfectly packed if at the time they received the goods the fact of the improper packing was brought to their notice by the consignor. But that contention is entirely displaced by what took place between Perry and the plaintiff. When the goods were tendered to Perry it was not the plaintiff who pointed out to Perry that they were improperly packed, but Perry who pointed out that fact to the plaintiff; the proper inference from which is that the plaintiff in substance said to Perry: "Whether they are well packed or badly packed, take them as they are." And if that is the effect of what took place between them the railway company are to my mind in exactly the same position as if they had had no notice of the improper packing. I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for the railway company: *Herbert H. Groves.*
Solicitors for the plaintiff: *Edgar & Co.*

J. F. C.

CARPENTER *v.* FINSBURY BOROUGH COUNCIL.

1920
March 5, 15.

[1918. C. 927.]

Negligence—Dangerous Portion of Street insufficiently lighted—Liability of Local Authority—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 130.

Sect. 130 of the Metropolis Local Management Act, 1855, provides that "every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as such vestry or board may think fit, necessary, or proper . . . . " :—

Held, that under this section the obligation of the local authority as to any particular street is to ensure that it is well and sufficiently lighted. Where an accident is alleged to have been due to the insufficient light provided for a street it is for the tribunal of fact to determine whether the statutory obligation of the local authority has been complied with; it is not enough for the local authority to say that in their discretion they considered that the lighting actually provided was sufficient.

Lamley v. *East Retford Corporation* (1891) 55 J. P. 133; *McClelland* v. *Manchester Corporation* [1912] 1 K. B. 118; and *Baldock* v. *Westminster City Council* [1918] W. N. 339; 17 L. G. R. 190 considered.

ACTION tried by Shearman J. without a jury.

The plaintiff claimed damages for the death of her husband James Carpenter on March 7, 1918. On that date London was under lighting restrictions, and the lamps in the defendants' area gave a reduced light owing to the fact that they were stippled in grey. Carpenter on the night of March 7 was driving a post-office van the seat of which was 7 ft. 3 ins. from the ground. The street through which he usually drove home being closed owing to there having been a fire, he turned into a parallel street in which apparently he had never been before. This street—Hatfield Street—is fairly wide at the end where Carpenter entered, but it gradually becomes narrower, and before it reaches Goswell Road it passes high buildings and then through an archway or tunnel, the entrance to which is only 9 ft. 2 ins. in height. When Carpenter was approaching the archway someone called to him, "You ought not to go

1920

CARPENTER v. FINSBURY BOROUGH COUNCIL.

under the archway." Carpenter asked, "Can I get through?" to which the other replied, "No, you will be killed." Carpenter then tried to pull up, but it was too late, and he was so crushed by contact with the top of the archway that he died immediately afterwards.

The judge found that Carpenter was a competent driver; that he was unable to see that he could not pass through the archway; and that he was not guilty of contributory negligence. The judge further found that Hatfield Street, including the archway, was a public highway; that the defendants were not responsible for the dangerous state of the buildings or for the laying out of Hatfield Street, which was in the same condition when they took it over as it was on March 7, 1918; that for at least twenty years the defendants, or their predecessors, had lighted the street in the same way by a series of lamps, the nearest lamp to the archway being 70 ft. from its entrance; and that that lamp did not throw a light sufficient to show exactly where the archway began or its height from the ground.

The plaintiff alleged that the accident was due to the breach by the defendants of the duty imposed upon them by s. 130 of the Metropolis Local Management Act, 1855 (1), to light the street sufficiently so to give notice of the existence of the archway.

Bevan K.C. and *Theobald Mathew* for the plaintiff. The obligation of the local authority under s. 130 of the Metropolis Local Management Act, 1855, is absolute. They must ensure that the streets in their district are well and sufficiently lighted. In this case the accident was due to the fact that the lighting was insufficient to disclose the existence of the archway, and that being so the defendants are liable: *McClelland* v. *Manchester Corporation.* (2)

Hollis Walker K.C. and *H. J. Rowlands* for the defendants. The obligation of the local authority under s. 130 is not absolute; the section gives the local authority a discretion as

(1) The section is set out in the headnote.

(2) [1912] 1 K. B. 118.

to what lighting is necessary for a particular street: per Lush and Bailhache JJ. in *Baldock* v. *Westminster City Council.* (1) It is true that in the Court of Appeal that case was decided on another point, but the view expressed in the Divisional Court ought to be followed. *McClelland* v. *Manchester Corporation* (2) does not assist the plaintiff, as there the Corporation had made and lighted the road in such a way as to constitute it a trap. So, too, in *Lamley* v. *East Retford Corporation* (3) the corporation had created the obstruction that caused the accident, and, having done so, the Court of Appeal said that steps ought to have been taken to light it so that it should not be a source of danger. In this case the defendants did not lay out the street in question, and it has been lighted in the same way for at least twenty years.

Bevan K.C. in reply. *McClelland* v. *Manchester Corporation* (2) is a direct authority in favour of the plaintiff. Lush J. said (4): "I think that . . . . as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground." The decision of the Divisional Court in *Baldock* v. *Westminster City Council*(1) cannot be relied on by the defendants in view of the way the case was decided in the Court of Appeal.

SHEARMAN J. stated the facts and continued: I have now to consider the law applicable to the circumstances of this case. Sect. 130 imposes an obligation upon the defendants to cause the several streets within their district to be well and sufficiently lighted, giving them, however, a discretion as to the hours during which the streets shall continue lighted. Have the defendants complied with this obligation? I do not think they have. I think they committed a breach of their statutory duty in failing to provide sufficient light to enable Carpenter to see that the place in question was extremely dangerous. I do not say that there is a breach of the statutory duty where all that is shown is that a street can be better lighted than it in fact is, and there may be some danger in the position at which I arrive in this case because expectant

(1) [1918] W. N. 339; 17 L. G. R. 190.
(2) [1912] 1 K. B. 118.
(3) 55 J. P. 133.
(4) [1912] 1 K. B. 133.

1920

CARPENTER v. FINSBURY BOROUGH COUNCIL.

Shearman J.

litigants may say when they have met with a street accident after dark that if the street had been better lighted the accident would not have happened. That is not the true position. For a plaintiff to succeed he must satisfy the tribunal of fact that in a place which the local authority is under an obligation to light there was not at the material time light sufficient for that particular place. As to the place where this accident happened, I think there should have been a light nearer than 70 ft. to the entrance of the archway.

There having in my opinion been a breach of the defendants' statutory duty, and the accident having been caused by that, I have to inquire whether the defendants have any answer to the plaintiff's claim. Is there any precedent for an action in these circumstances? I was referred to *McClelland* v. *Manchester Corporation*. (1) There Lush J. found for the plaintiff in a case where the corporation had laid out a road in such a way as to be dangerous only in consequence of the lighting being insufficient. The difficulty in that case is that the question of lighting does not seem to have been left to the jury, and Lush J. apparently accepted a finding that the place was a hidden trap for persons using the road as equivalent to a finding that the place was not sufficiently lighted. Moreover, that case is not quite a precedent for this case inasmuch as there the corporation were themselves responsible for the dangerous condition of the road apart from the lighting, and it might well be said that the absence of lighting was only one of the elements which made the other misfeasance of the corporation effective. In the same case Lush J. referred, and I have been referred, to *Lamley* v. *East Retford Corporation*. (2) But that again is not like this. There the defendants were given a discretionary power to light, and, as I understand it, the decision proceeded on the footing that, having undertaken the duty of lighting, there was an obligation on the defendants to maintain sufficient light to show posts which they had themselves erected. What has given me greater trouble is the decision in *Baldock* v. *Westminster City Council*. (3) The

(1) [1912] 1 K. B. 118.
(2) 55 J. P. 133.
(3) [1918] W. N. 339; 17 L. G. R. 190.

facts there were that the Westminster City Council erected a street refuge and lighted it with a red lamp which, however, at the material time, had been allowed to go out. In the Divisional Court Lush and Bailhache JJ. said that under s. 130 of the Act of 1855 "the duty was placed upon the defendants of causing the streets to be well and sufficiently lighted. Under that section the question of what amount of light was reasonably necessary for the requirements of a particular district was for the local authority, and it was not competent for a jury to say that more light ought to have been provided than the local authority had considered necessary." If that is a correct exposition of the law, my view is wrong; but I observe that although the decision of the Divisional Court was upheld in the Court of Appeal it was upheld upon different grounds. The Court of Appeal held that the defendants having lighted the refuge they had led the public to believe that it would always be lighted, and therefore they must be held responsible for having allowed the light to go out on the particular occasion. I may add that the decision of the Divisional Court may be distinguished from this case because there the obstruction—the street refuge—was one which the city council had statutory power to make, and it may be said that having a statutory power to place it where they chose they were under no obligation to light it. This case I think is free from authority.

Having come to the conclusion that the defendants lighted the place in question inadequately and so committed a breach of their statutory obligation, I think the case falls within the principle of *Geddis* v. *Bann Reservoir Proprietors* (1) that an action lies against a public authority for having done negligently an act which the Legislature has authorized them to do. There will be judgment for the plaintiff for 250*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Theodore Goddard & Co.*
Solicitors for defendants: *W. T. Ricketts & Son.*

J. S. H.

(1) (1878) 3 App. Cas. 430.

1919
Dec. 19.

In re LEE.

Ex parte GRUNWALDT.

Bankruptcy—Deed of Arrangement—Non-Registration—Invalidity—Trust for Benefit of Creditors—Money received by Trustee of Deed—Death of insolvent Debtor—Estate administered by Official Receiver—Right of Official Receiver to claim Money still in Hands of Trustee of void Instrument—Estoppel—Statutes of Limitation—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *s.* 4, *sub-s.* 2 (*a*) (*b*)—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 130.

In 1904 a debtor who was heavily indebted, and against whom bankruptcy proceedings were pending, signed an instrument under which a trustee was to receive the whole of the debtor's income and, after making certain deductions, to distribute the balance among the creditors, and in consideration of the arrangement the creditors agreed that all proceedings in bankruptcy or otherwise were to be stayed and to accept payment of their debts by instalments and to release the debtor from all claims or demands in respect of their debts. The instrument provided that no document executed by the debtor should be registered under the Deeds of Arrangement Act, 1887. A number of the then creditors including the applicant assented to the instrument, which was never registered under the Act of 1887. The arrangement was carried out until the death of the debtor, which occurred in November, 1918, the applicant receiving pro rata amounts on his debt between August, 1905, and July, 1917. The debt carried interest at 4 per cent. and the payments under the arrangement to the applicant were not sufficient to cover the interest, so that an amount exceeding the original debt was still owing to the applicant. In February, 1919, an administration order under s. 130 of the Bankruptcy Act, 1914, was made upon a creditor's petition for the administration of the deceased debtor's estate as being a person who had died insolvent, and the estate was being administered by the official receiver. At the time of the debtor's death there was in the hands of the trustee under the instrument a sum of 465*l.* 8*s.* 3*d.* which the official receiver claimed on the ground that it formed part of the general estate of the debtor, and the trustee paid the amount to him upon the terms that the official receiver was to be in the same position as he would have been if the money had remianed in the trustee's hands.

On a motion by the applicant for a declaration (1.) that the 465*l.* 8*s.* 3*d.* was held by the trustee on behalf of the assenting creditors, including the applicant; (2.) was divisible amongst them; (3.) that the applicant was entitled to prove in the administration of the estate for the balance due to him from the debtor after giving credit for all sums received or receivable under the arrangement:—

1919

LEE, *In re.* GRUNWALDT *Ex parte.*

Held: (1.) That the instrument was a deed of arrangement within the meaning of s. 4, sub-s. 2, of the Deeds of Arrangement Act, 1887, upon the ground that it was an assignment of property by the debtor for the benefit of his creditors generally and also upon the ground that it was an agreement for a composition; (2.) that not having been registered it was void under s. 5 of the Act; (3.) that as the instrument was void it created no trust for the benefit of the creditors, and that the trustee under the instrument held the 465*l.* 8*s.* 3*d.* to the use of the official receiver as the representative of the debtor, and was bound to repay it to him; (4.) that as the only direction to apply the money received by the trustee was contained in the void instrument and all parties knew and acted upon the assumption that it was invalid, the deceased debtor would not have been, nor was the official receiver as his representative, estopped from setting up its invalidity and claiming from the trustee any money still in his hands; (5.) that equally there was no estoppel which prevented the applicant from setting up the invalidity of the instrument and proving in the administration for the balance due to him from the debtor; (6.) that as the instrument was void the release of the debts it contained was of no effect; (7.) that as under the instrument there was only a provision for payment to the creditors of the debtor's income so long as he lived, no promise to pay the balance of the debts could be implied from the payments which had been made so as to take the debts out of the operation of the statutes of limitation, and that the applicant's right to prove in the administration for the balance due to him was therefore barred.

Runtz v. *Longbourne* (1892) 8 Times L. R. 568; *In re Wilson* [1916] 1 K. B. 382; and *Roe* v. *Mutual Loan Fund* (1887) 19 Q. B. D. 347, distinguished.

Dictum of Phillimore L.J. in *In re Wilson* [1916] 2 H. B. R. 70, 81, 82, applied.

MOTION on behalf of the applicant, P. M. Grunwaldt, for an order (1.) that it might be declared that the sum of 465*l.* 8*s.* 3*d.* formerly in the hands of Charles William Middleton Kemp and by him paid over to the respondent the official receiver was held by the said Kemp for and on behalf of such of the creditors of the debtor, Sir Henry Austin Lee, deceased, including the applicant as assented to or became parties to an arrangement made in the year 1904 for the payment of their debts; (2.) that it might be declared that the said sum was divisible amongst the said creditors; (3.) that it might be declared that the applicant was entitled to prove in the administration of the estate for the balance due to him from the debtor after giving credit for all sums received or receivable under the arrangement.

On June 14, 1904, the applicant recovered judgment against

1919

LEE, *In re.* GRUNWALDT, *Ex parte.*

the debtor for 1,303*l.* 14*s.* 4*d.* and costs in the King's Bench Division.

On or about the same date the applicant's solicitors received the following circular :—

" Private and Confidential.

" SIR HENRY AUSTIN LEE, K.C.M.G., C.B.

" At the adjourned meeting of creditors held at the offices of Messrs. Hartcup, Davis & Cobbold, on the 22nd April, 1904, the following arrangements were agreed to :—

" That on payment of the bankruptcy costs incurred, the petitions filed by Sir John Murray Scott and Messrs. J. Wood & Son, Messrs. Marcus & Co., the Pride of Gwalior Company, and the Empress of Gwalior Company, be dismissed.

" That Mr. C. M. Kemp, of the firm of Kemp, Son & Co., of 36 Walbrook, Accountants, be appointed to receive and distribute among the creditors the income agreed to be set aside and any other monies that may be received, and that Messrs. Renshaw, Kekewich & Smith, of 2 Suffolk Lane, Cannon Street, do represent the creditors in connection with the carrying out of the arrangements come to.

" That any preference which may have been given by Sir Henry Austin Lee to one or more of his creditors over the other creditors in respect of the fees receivable by him as a director of the Suez Canal Co. be waived and put an end to.

" That the sum of 700*l.* a year be allowed to Sir Henry Austin Lee, and that subject to this all his present income be received by Mr. Kemp on behalf of the creditors. In the event of Sir Henry Austin Lee's present income being increased either by his retirement on pension from the diplomatic service or from any directorships to which he may hereafter be appointed, or from any other employment or source whatever such additional income shall be received by Mr. Kemp, and as to three-fourths thereof shall be distributed among the creditors, and as to the remaining one-fourth be paid over to Sir Henry Austin Lee and be received by him in addition to the 700*l.* a year above referred to.

" Sir Henry Austin Lee shall forthwith by means of a power of attorney or otherwise as counsel may advise ensure the

receipt by Mr. Kemp of the monies agreed to be divided among the creditors.

"Sir Henry Austin Lee to retain as his own property the furniture and other articles belonging to him in his apartments in Paris.

"Sir Henry Austin Lee to enter into a covenant with Mr. Kemp as representing the body of creditors, that so long as any monies may remain due to his creditors he will not purchase or speculate in shares on the Stock Exchange or enter into any company or other speculations, and will not incur debts at any one time to a greater amount than the sum of 50*l.*; and also to give immediate notice to Mr. Kemp of any additional income or property being received by him.

"In consideration of the above arrangements being made by Sir Henry Austin Lee the creditors agree that all proceedings in bankruptcy or otherwise be stayed and to accept repayment of their debts by instalments in the manner hereinbefore provided, and to release Sir Henry Austin Lee from all further claims or demands in respect of such debts.

"Mr. Kemp is to be at liberty to at once deal with and settle the claims of the Pride of Gwalior Company and the Empress of Gwalior Company now being wound up and also to settle all small debts of 10*l.* or less. It was agreed that no document executed by Sir Henry Austin Lee shall be registered under the Deeds of Arrangement Act, 1887.

"The costs of the solicitors representing Sir Henry Austin Lee and the creditors of and incidental to the two meetings of creditors held and the carrying out of the resolutions passed at such meetings shall be paid out of the first monies received by Mr. Kemp.

" agree to the terms of this arrangement, and will sign any further agreement or memorandum which counsel instructed on behalf of the creditors may consider necessary to carry the agreement into effect.

"Dated, May, 1904."

At the foot of the circular was added the following clause, which was signed by the debtor on October 12, 1904 :—

1919

LEE, *In re.* GRUNWALDT, *Ex parte.*

"To CHARLES WILLIAM MIDDLETON KEMP.

"I hereby agree with you as the representative of my creditors, who have agreed to the scheme of arrangement set out in the above circular to forthwith sign all documents, requests or authorities which may be necessary to enable you to receive my whole income from every source whatever, and to do every act and thing to enable the above scheme to be carried through.

"Dated this 12th October, 1904.

"(Sd.) H. AUSTIN LEE."

In April, 1904, at the time the meeting of creditors was held at which the scheme for the payment of his debts by instalments appearing from the above circular was agreed to, the debtor was heavily indebted and bankruptcy proceedings were then pending.

In accordance with the suggestion contained in the circular the applicant became a party to the scheme and signed a form of assent in the form appearing in the circular.

A number of the then creditors became parties to the scheme, and the debts of the assenting creditors amounted to about 55,000*l.*

The debtor's income was derived partly from his salary in the Foreign Office, which amounted to 1,500*l.* per annum, and partly from his fees as director of the Suez Canal, which averaged about 1,800*l.* per annum. After deducting 1,000*l.* per annum payable to secure a retiring pension and the income of 700*l.* reserved to the debtor, the scheme left a residue of about 1,600*l.* per annum to be paid to creditors under the scheme.

Although none of the documents relating to the scheme were ever registered, the scheme (with some slight variations, the most material of which was the increase in the year 1913 of the amount of income reserved to the debtor to 900*l.* per annum) and the arrangements were carried out until the death of the debtor in November, 1918.

The course adopted was that from time to time the debtor signed requests and authorities to the Paymaster and to the Suez Canal Company to pay to Messrs. Barclay & Co., bankers,

of 54 Lombard Street, the salary payable to him by the Foreign Office, and the salary, fees and share of profits payable to him by the Suez Canal Company. The debtor directed the bankers to transfer such sums as they received by virtue of the requests and authorities to the credit of the account of Mr. Kemp, who was to hold all sums so received on behalf of the creditors assenting to the terms of the arrangement. Moneys were paid to the creditors from time to time pro rata on their debts. Pro rata amounts were received in respect of the applicant's judgment debt between August 11, 1905, and July 1, 1917, inclusive. The judgment debt carried interest at the rate of 4 per cent., and the above-named payments were not sufficient to cover the interest, and consequently there was still due and owing in respect of the judgment debt and interest an amount exceeding the original judgment debt. The aggregate amount of debts still remaining unpaid to creditors who assented to the scheme was believed to be over 39,000*l.*

On November 7, 1918, the debtor died, and on February 5, 1919, an administration order under s. 130 of the Bankruptcy Act, 1914, was made upon a creditor's petition for the administration of the deceased debtor's estate as being the estate of a person who had died insolvent, and the estate was being administered by the official receiver.

At the time of the debtor's death there was in the hands of Mr. Kemp a sum exceeding 500*l.*, which had been received by him on behalf of the creditors. This sum represented a balance (after making proper payments under the scheme) in respect of items received by Mr. Kemp from time to time for Foreign Office salary and payments from the Suez Canal Company, and also interest on the deposit account at Messrs. Barclay & Co. standing in the name of Mr. Kemp. No sums were received by Mr. Kemp from any other source. The last payment received from the Foreign Office was on July 11, 1918, and the last payment by the Suez Canal Company was made on August 1, 1918. After August 1, 1918, no payment was received by Kemp excepting a small sum for interest on the deposit at Messrs. Barclay &

1919

LEE, *In re.* GRUNWALDT, *Ex parte.*

Co.'s Bank. After deduction from this sum of the charges of Mr. Kemp and his solicitors there remained a balance of 465*l.* 8*s.* 3*d.*

After the Administration Order the official receiver claimed this sum of 465*l.* 8*s.* 3*d.* from Kemp, and the latter paid it over to the official receiver. Questions affecting the rights of all the creditors assenting to the scheme had arisen with the official receiver, and it had been agreed between the solicitors for the applicant and for the official receiver respectively that the questions should be submitted to the Court for its determination.

In pursuance of the agreement the motion was brought, the official receiver being made the respondent.

On February 21, 1919, Mr. Kemp enclosed a cheque for 465*l.* 8*s.* 3*d.* in a letter of that date addressed to the official receiver, in which he (Kemp) said "it should be understood that it remains impressed under the trust referred to, and will be subject to claims by creditors under the assignment." On February 24, 1919, the official receiver acknowledged receipt of the cheque by a letter of that date in which he said that the 465*l.* 8*s.* 3*d.* was "alleged by you" (Kemp) "to be held in trust for creditors under an unregistered assignment."

At the hearing of the motion no point was made of the fact that the 465*l.* 8*s.* 3*d.* had been paid by Kemp to the official receiver, and it was agreed that the official receiver was only in the same position as he would have been if the money had remained in Kemp's hands.

The official receiver contended that the 465*l.* 8*s.* 3*d.* formed part of the general estate of the debtor and was not the money of, or divisible amongst, the assenting creditors; and that no claim by any of the assenting creditors was provable against the estate on the ground that the debts were statute barred and that the payments made under the scheme were not such as to take the debts out of the operation of the statute of limitations. On behalf of the applicant it was submitted that the 465*l.* 8*s.* 3*d.* was the money of, or properly divisible amongst, the assenting creditors, and that under the

circumstances their right to prove against the estate was not barred by any statute.

Giveen for the applicant. The 465*l.* 8*s.* 3*d.* was received by Mr. Kemp on behalf of the creditors and is not recoverable from him by the official receiver. Unless the debtor could have dealt with the fund during his lifetime, the official receiver has no claim to it after his death: *Runtz* v. *Longbourne.* (1) A payment under a void deed is irrecoverable. Payment to Mr. Kemp is payment to the creditors.

[HORRIDGE J. As the payment to Mr. Kemp was a payment under a void deed, no trust was created. Therefore as it was a payment without consideration, it is recoverable.]

A payment to a creditor cannot be recovered back. It was just as much a payment to the applicant and the other creditors when it was handed to Kemp as if it were paid to the creditors themselves. A payment made to creditors under a void deed is not void: *Harland* v. *Binks* (2); *Siggers* v. *Evans.* (3) There is no authority directly in point, but the money in Kemp's hands is in the same position as that which was in the trustee's possession in *Harland* v. *Binks.* (2) The money was paid to Kemp as agent for his principal, the assenting creditors.

[HORRIDGE J. The only thing the creditors have done is to assent to a deed which cannot be put in.]

The official receiver is estopped from claiming the money because the debtor would have been estopped from claiming it: *In re Wilson.* (4) By the money being in the hands of Kemp the debtor obtained the benefit of the arrangement. He received benefit up to the time of his death. He had the benefit of the creditors staying their hands. He was therefore estopped as against the creditors from demanding back the payments made to Kemp.

[HORRIDGE J. It may be that the debtor could not have been heard to say the deed was void as to past transactions.]

(1) 8 Times L. R. 568.
(2) (1850) 15 Q. B. 713.
(3) (1855) 24 L. J. (Q.) B. 305.
(4) [1916] 1 K. B. 382.

1919

LEE, *In re.* GRUNWALDT, *Ex parte.*

[*Roe* v. *Mutual Loan Fund* (1); *In re Wilson* (2); *In re Knott* (3); *In re Gould* (4); *In re Saumerez* (5); and *In re Allix* (6) were also referred to.]

Hansell for the official receiver. The circular was an assignment of property for the benefit of the creditors generally and was a deed of arrangement within the meaning of s. 4 of the Deeds of Arrangement Act, 1887. (7) It is therefore void for non-registration. The official receiver is not estopped from alleging that the deed is void, for there was no representation to the creditors in consequence of which they changed their position. They all knew the document was a deed of arrangement and agreed that it should not be registered. The debtor made no representation. In *Roe* v. *Mutual Loan Fund* (1) there was a representation, but in the present case the creditors all agreed to treat the document as if it were not a deed of arrangement and to take their chance. Either the debtor or the creditors could, at any moment, if they had desired to do so, have refused to continue to act on the agreement. It was merely a friendly arrangement. The language of Phillimore L.J. in *In re Wilson* (8) is applicable. He said: "If A. B. has got C. D.'s property under a void document he holds it, and he has received it, to the use of C. D. and must hand it back to C. D. upon demand."

It must be admitted that it is doubtful, as the deed is void, whether the creditors are debarred by the release

(1) 19 Q. B. D. 347.
(2) [1916] H. B. R. 70.
(3) (1877) 7 Ch. D. 549 *n.*
(4) (1887) 19 Q. B. D. 92.
(5) [1907] 2 K. B. 170.
(6) [1914] 2 K. B. 77.
(7) Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), s. 4, sub-s. 2: "A deed of arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—
(*a*) An assigment of property;
(*b*) A deed of or agreement for a composition."
Sect. 5: "From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor. . . . ."
(8) [1916] H. B. R. 70, 81, 82.

contained in the instrument from enforcing any rights they may have.

The payments made by the debtor under the document are not such as would enable a promise to pay the balance of the debts to be implied: *Davies* v. *Edwards* (1); *Ex parte Topping* (2); *Taylor* v. *Hollard* (3); *In re Benzon.* (4) The claim of the creditors is therefore barred by the statutes of limitation.

Giveen in reply. The debtor represented that the fund would remain in Kemp's hands for the creditors, and the creditors acted upon that representation. He would therefore have been estopped from reclaiming the money, and the official receiver can be in no better position. The observations of Phillimore L.J. in *In re Wilson* (5) have no application to the present case. As to the statutes of limitation *Davies* v. *Edwards* (1) and *Ex parte Topping* (6) are distinguishable. In those cases the payments were made in invitam, and therefore a promise to pay could not be implied. In the present case they were voluntary.

[Leake on Contract, 6th ed., p. 726, was also referred to.]

HORRIDGE J., after stating the facts and observing that questions of some difficulty were raised, continued: The applicant, who is one of the creditors of Sir Henry Austin Lee, deceased, asks that it may be declared that the sum of money which has been paid to the official receiver by Mr. Kemp in circumstances which place the official receiver in no better position than if it had not been paid over, should be declared to be the property of the creditors who entered into that arrangement; and in the alternative that he should be allowed to prove on the estate of the debtor for unsatisfied balances owing to him on his original debt under the judgment, with interest.

The first point made by the official receiver in answer to the application is that the circular of June, 1904, was a deed of

(1) (1851) 7 Ex 22.
(2) (1865) 34 L. J. (Bk.) 44.
(3) [1902] 1 K. B. 676.
(4) [1914] 2 Ch. 68.
(5) [1916] H. B. R. 70, 81, 82.
(6) (1865) 34 L. J. (Bk.) 44.

1919

LEE, *In re.* GRUNWALDT, *Ex parte.*

Horridge J.

arrangement within the meaning of s. 4 of the Deeds of Arrangement Act, 1887.

In my view this document was available for creditors generally; and any creditor who liked to come in under it would have been entitled to do so. Further, I think it was an assignment of property, that is to say, of Sir Henry Austin Lee's right to recover fees as a director of the Suez Canal Co., and any other income that he might obtain over and above the amounts specifically allowed for his own personal wants. I also think it was a deed of or agreement for a composition, because it might be that the creditors under the clause whereby they agreed to accept the sums as they were received by Mr. Kemp in satisfaction of their debts, would yet go short of full payment, for Sir Henry Austin Lee might die before sufficient money had been received to pay them in full. That being so, the document ought to have been registered, and not having been registered, it was, under s. 5, void.

On behalf of the applicant it is contended that although the document was void, the money was received by Mr. Kemp impressed with the trust for the benefit of this particular body of creditors; and in support of that contention the decision of Mathew J. in *Runtz* v. *Longbourne* (1) was relied on. In reading a portion of the statement of facts in that case Mathew J. said (1): "The deed was executed in due course by Leonard, but he declined to allow it to be registered as required by the Act, as if that were done he would probably lose his official appointment. The proposal therefore came to an end, but the debtor intimated to Mr. Stevens that he would carry out his part of the arrangement just the same, and pay the quarterly instalments as if the deed were binding. Mr. Stevens again communicated with the creditors, and advised them to accept the offer, as the only alternative was making the debtor a bankrupt, which would result in his losing his appointment." Money under that verbal arrangement was subsequently paid to the trustee, and it was held it could not be recovered back, because it was impressed with a verbal trust. But in

(1) 8 Times L. R. 568.

the present case there was no verbal trust; there was only the trust contained in the void document which ought to have been, but was not registered as a deed of arrangement. The result therefore is that the trustee, Mr. Kemp, has received certain money which he cannot justify himself in holding, except by setting up the document which I have held to be absolutely void, and that there is no trust independently of that document. That being so, the present case in my judgment comes within the language used by Phillimore L.J. in *In re Wilson* (1), when he said: "But if A. B. has got C. D.'s property under a void document he holds it, and he has received it, to the use of C. D., and must hand it back to C. D. upon demand." It is quite true that that passage was in a dissentient judgment; but it does not in any way bear on the point on which Phillimore L.J. was dissenting, and therefore, it seems to me that I may take the learned Lord Justice's remarks as, at any rate, a good way of putting the point which seems to me to arise in the present case. Therefore, in my view Mr. Kemp having received this money under a void document could be compelled to hand it back to Sir Henry Austin Lee, if he were alive, and is equally bound to repay it to his representative after his death. That entirely distinguishes the present case from *Runtz* v. *Longbourne.* (2)

It was also contended on behalf of the applicant that the debtor would have been estopped from saying that the money was not to be applied in favour of the creditors. The only right to apply it in favour of the creditors, and the only direction given was by the void deed; and until the money had been paid over, and the payment had been ratified by the debtor, in my view he would have been entitled at any moment to ask for it back. It is not like *In re Wilson* (3) or *Roe* v. *Mutual Loan Fund.* (4) I held in *In re Wilson* (3) and the Court of Appeal decided in *Roe* v. *Mutual Loan Fund* (4) that a person who had relied upon an invalid deed, and had set it up so as to obtain

(1) [1916] H. B. R. 70, 81, 82.
(2) 8 Times L. R. 568.
(3) [1916] 1 K. B. 382.
(4) 19 Q. B. D. 347.

1919

LEE, *In re.* GRUNWALDT, *Ex parte.*

Horridge J.

the benefit of it, could not afterwards go back upon it and allege that it was invalid. But the distinction between those cases and the present one is that in the present case all parties knew that this deed was invalid. That was the assumption from the very first; and the provision was expressly inserted in the document that it should not be registered under the Deeds of Arrangement Act, 1887. I therefore think that this was a deed of arrangement; that the moneys in the hands of the trustee were repayable when demanded, either by the debtor or by the official receiver under the administration decree; and that there was nothing done which estopped either the debtor or the official receiver from claiming the moneys.

A further question is raised by the portion of the notice of motion which asks that it may be declared that the applicant is entitled to prove in the administration.

In answer to that, Mr. Hansell, on behalf of the official receiver, suggested that the applicant could not prove because he had estopped himself by being a party to the deed of arrangement. But if I hold that Mr. Giveen is not entitled on behalf of the applicant to rely upon any estoppel, I cannot in favour of the official receiver uphold an argument founded upon estoppel.

Mr. Hansell also referred to a clause in the deed releasing the debts. Of course, if the deed goes as a bad deed, that clause goes with it.

But his last point on behalf of the official receiver was that the debts are statute barred and that the payments which had been made to Mr. Kemp were not such as to create the implication of a promise to pay the balance of the debts. Now it is quite clear law that a payment made so as to take a debt out of the statute, must create the implication of a promise to pay upon a condition which has been fulfilled, or out of a fund or generally the balance of the debt. The short way of putting the position is the way in which Channell J. put it in *In re Benzon* (1): "There was some suggestion that the payment and receipt of dividends might take the case out of

(1) [1914] 2 Ch 68, 77.

the statute, but a payment to have that effect must be a payment from which a promise to pay the balance could be inferred."

What is the true inference to draw from the circumstances of the present case? I have no doubt that what took place was that both Sir Henry Austin Lee and the trustee went on treating this document, for the purpose of making the payments, as a good deed of arrangement; and it was under that deed of arrangement, as they treated it, that these payments were made. It is quite clear that under that deed there was no promise to pay any more than would come from the income, so long as Sir Henry Austin Lee lived. How can I say under those circumstances that I can infer any promise to pay the balance of the debt? It is only payable if and so far as there were enough moneys received under that arrangement to pay the debts. Enough moneys have not been received because Sir Henry Austin Lee has died. There has not been enough to pay the debts; and I have held that the only amount that there was in hand at the time of the death belongs to the official receiver. It is impossible under those circumstances to infer any promise to pay the balance of the debts from the payments which have been made, and, therefore, I must refuse this motion on both grounds.

Motion dismissed.

Solicitors for applicant: *Cohen & Cohen.*
Solicitors for official receiver: *Tarry, Sherlock & King.*

J. E. A.

C. A.
1919
Dec. 8, 9.

[IN THE COURT OF APPEAL.]

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY, LIMITED *v.* THE KING.

[1919. A. 960.]

Practice—Arbitration—Petition of Right—Staying Proceedings—Fiat—Step in the Proceedings—Petition of Right Act, 1860 (23 & 24 *Vict. c.* 34), *ss.* 2, 3, 4, 7—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 23.

Held, by Bankes and Warrington L.JJ. :—

(1.) That where a petition of right, founded on a contract with the Crown which contains a written agreement to submit differences to arbitration, has been filed in the High Court of Justice, proceedings in the petition may in a proper case be stayed under s. 4 of the Arbitration Act, 1889 ;

(2.) That the granting of the King's fiat is not a step in the proceedings within the meaning of that section ;

(3.) That in the circumstances there was no written agreement to submit differences to arbitration.

Held, by Bankes, Warrington and Scrutton L.JJ., that as the matters in dispute included an important constitutional question the proceedings in the petition ought not to be stayed.

Decision of Bailhache J. affirmed.

APPEAL from the decision of Bailhache J. in chambers, affirming an order of a Master who refused to refer to arbitration the petition of right hereinafter mentioned.

By Royal Proclamation of August 3, 1914, His Majesty authorized and empowered the Lords Commissioners of the Admiralty by warrant under the hand of their secretary or under the hand of any Flag Officer of the Royal Navy holding any appointment under the Admiralty to do the acts following—namely, " to requisition and take up for Our service any British ship or British vessel as defined by the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such period of time as may be necessary on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage

thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose."

The Anglo-Newfoundland Development Co., Ld., the respondents in this appeal, were the owners of two steamships named respectively the *Cranley* and the *Alconda*.

By a letter dated January 22, 1917, the Lords Commissioners of the Admiralty requisitioned the *Cranley*, and by a letter dated April, 1917, they requisitioned the *Alconda*. The letter of January 22, 1917, was addressed to the respondents in these terms: "I am commanded by My Lords Commissioners of the Admiralty to acquaint you that it has been found necessary to requisition the *Cranley* under Royal Proclamation of August 3, 1914, for use on urgent Government service under the conditions of the pro forma charterparty T. 99 enclosed. . . . . Rates of hire have been fixed for requisitioned ships on the basis of the reports of the Admiralty Transport Arbitration Committees subject, in the case of certain classes of vessels, to subsequent modifications (vide form T. 11541 attached). These rates have been generally accepted by shipowners, and payments on account on this basis will be made to you as soon as possible on receipt of a claim therefor. . . . . " The letter of April, 1917, requisitioning the *Alconda* was in all material respects identical with the letter of January 22.

Charterparty T. 99 contained 42 clauses. It purported to be made between the owners of the requisitioned steamship in question and the Director of Transports for and on behalf of the Lords Commissioners of the Admiralty. By clause 2 the owners agreed to let and the Admiralty agreed to hire the steamship for a term of calendar months certain from the day she was placed at the disposal of the Admiralty at in such dock or at such wharf or place immediately available as the Admiralty might direct, she being then ready to receive cargo and tight, staunch and

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

strong. By clause 4 hire was to commence on and from the day of delivery to the Admiralty. By clause 5 the Admiralty agreed to pay for the use and hire of the steamer at the rate of *l.* per calendar month commencing when she should be placed at Admiralty disposal as provided in clause 4.

Clause 31 was in these words: "Any dispute arising under the charter shall be referred under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law."

Form No. T. 11541 mentioned in the letter of January 22, 1917, was a form of agreement which, as stated by the Report of the Admiralty Transport Arbitration Board (Addendum No. 4) had been arrived at between a representative committee of owners and the Director of Transports at a meeting on March 1, 1915. It specified certain scales of rates per ton gross register per month for requisitioned ships of the class to which the *Crawley* and the *Alconda* belonged. The report also stated that by agreement the owners should be indemnified against any extraordinary expenses connected with the charter to the Government and also against third party commitments, such expenses and indemnification to be outside the rate of hire.

The respondents were dissatisfied with the payments made to them by the Government on account of hire and expenses. On June 6, 1919, they prepared a petition of right claiming as extraordinary expenses and third party commitments certain payments amounting to 11,056*l.* made by them for insuring the vessels in obedience, as they said, to the direction of the Government, and also asserting that, by terms arranged by the Admiralty Transport Arbitration Board, the basis of payment for requisitioned ships was to

include a rate of hire sufficient to yield a fair shipping trade profit after allowing for running and establishment expenses and depreciation of ship and engines. Further by para. 10 they claimed a reasonable rate of remuneration which, they asserted, would be one covering all the expenses they had incurred, an allowance for depreciation and classification, and a fair shipping trade profit. The petition was intituled in the King's Bench Division and the venue was laid in Middlesex, as directed and authorized by s. 1 of the Petition of Right Act, 1860. (1) It was then left with the Secretary

(1) Petition of Right Act, 1860 (23 & 24 Vict. c. 34), s. 1: "A petition of right may, if the suppliant think fit, be intituled in any one of the superior Courts of common law or equity at Westminster in which the subject matter of such petition or any material part thereof would have been cognizable if the same had been a matter in dispute between subject and subject, and if intituled in a Court of common law shall state in the margin the venue for the trial of such petition; and such petition shall be addressed to Her Majesty in the form or to the effect in the schedule to this Act annexed (No. 1). . . . .

Sect. 2: "The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

Sect. 3: "Upon Her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the Solicitor to the Treasury, with an indorsement thereon in the form or to the effect in the Schedule (No. 2) to this Act annexed, praying for a plea or answer on behalf of Her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject matter of such petition may relate, and the same shall be prosecuted in the Court in which the same shall be intituled, or in such other Court as the Lord Chancellor may direct.

Sect. 4: "The time for answering, pleading, or demurring to such petition, on behalf of Her Majesty, shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the Solicitor to the Treasury, or such further time as shall be allowed by the Court or a Judge; Provided always, that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the Court in which such petition shall be prosecuted, or the venue for the trial of the same."

Sect. 7: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

of State for the Home Department in order to be submitted to His Majesty for his fiat that right be done, as directed by s. 2 of the Act. The fiat was granted by the Attorney-General. A copy of the petition and fiat were then left at the office of the Solicitor to the Treasury indorsed, as directed by s. 3 of the Act, with the words : "The suppliants pray for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed." According to the practice pursued under s. 3 the Solicitor to the Treasury transmitted the petition and fiat to the Writ Department of the Central Office of the Royal Courts of Justice together with a copy for service, and the petition and fiat were filed in the Writ Department.

as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right . . . ."

Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Sect. 23: "This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown."

A summons was taken out on behalf of the Crown to stay proceedings in the petition of right under s. 4 of the Arbitration Act, 1889. The affidavit in support of the summons after stating the prayer of the petition and making mention of the *Cranley* and the *Alconda* continued thus :—

" 3. The said ships were requisitioned by letters from the Admiralty to the suppliants dated January 22, 1917, in the case of the *Cranley* and April, 1917, in the case of the *Alconda*, and I believe the said letter of April, 1917, was accompanied by a letter of April 6, 1917. . . . . 4. The agreements relied upon in the petition (1) are the agreements contained in the said letters and in the Report of the Admiralty Transport Arbitration Committee. . . . . 5. The said agreements constitute or contain respectively agreements to submit differences to the arbitration of the Board of Arbitration to be appointed under His Majesty's Proclamation of August 3, 1914." . . . .

The Master in Chambers refused to stay the proceedings. On appeal Bailhache J. affirmed the decision of the Master.

The Crown appealed.

Sir Gordon Hewart A.-G., *MacKinnon K.C.* and *Ricketts* for the Crown.

R. A. Wright K.C. and *Claughton Scott* for the respondents.

The arguments of counsel sufficiently appear from the judgments. In addition to the cases therein mentioned *Lobitos Oilfields, Ld.* v. *Admiralty Commissioners* (2) and *Ives* v. *Willans* (3) were cited.

BANKES L.J. The respondents are the owners of two vessels, the *Cranley* and the *Alconda*, which were both requisitioned by the Government by virtue of the Proclamation of August 3, 1914. The respondents claimed that they were entitled to more than the Government was willing to give them for the hire of the vessels, and they prepared

(1) Save as above stated there were no "agreements relied upon in the petition."

(2) (1917) 33 Times L. R. 472.

(3) [1894] 2 Ch. 478.

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

Bankes, L.J.

a petition of right and applied for the necessary fiat. The fiat was granted and the respondents commenced proceedings in the High Court by filing the petition. Then the advisers of the Crown applied for an order under s. 4 of the Arbitration Act, 1889, to stay all further proceedings in the petition. That application failed before both the Master and the judge in chambers. The Crown now appeals to this Court from the refusal of the Master and the learned judge to stay the proceedings.

The respondents contend that the appeal should be dismissed on four grounds; first, that the Crown has taken a step in the proceedings; secondly, that when a petition of right has been filed it cannot be referred to arbitration; thirdly, that in this case there was no submission to arbitration; and fourthly that, if the Court has a discretion to refer the dispute to arbitration or allow the petition to proceed, it should not exercise that discretion by referring this dispute.

The first two contentions are of general importance to the relation between the Crown and the subject. In my opinion it would be a misfortune to the subject if these contentions should prevail, because if they did the Attorney-General before issuing a fiat would have to consider not only whether there is a claim worthy to be investigated, but also whether the Crown should insist on arbitration as the means of investigating it; and so the subject could never present to a Court of justice his view that his claim should be tried in Court and not by arbitration.

The first question, whether the Crown has taken a step in the proceedings, depends on the Petition of Right Act, 1860, and s. 4 of the Arbitration Act, 1889, by which, when legal proceedings have been commenced by one party to a submission against the other, either party may after appearance and before taking any step in the proceedings apply to the Court for a stay. The question is whether the Crown by issuing the fiat has taken a step in the proceedings in the Court. In my opinion it has not. The fiat is a matter preliminary to the legal proceedings. The Petition of Right Act, 1860, prescribes the steps to be taken by a suppliant.

By s. 1 a petition of right may, if the suppliant think fit, be intituled in any one of the superior Courts of common law . . . . and if intituled in a Court of common law shall state in the margin the venue for the trial of the petition; and the petition shall be addressed to His Majesty in the form or to the effect in the schedule to the Act annexed. By s. 2, the petition is to be left with the Secretary of State for the Home Department "in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant Her fiat that right be done." . . . . By s. 3, "Upon Her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the Solicitor to the Treasury with an indorsement thereon in the form or to the effect in the schedule (No. 2) to this Act annexed." . . . . That form is in these words: "The suppliant prays for a plea or answer on behalf of Her Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed." Sect. 3 goes on: "And it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject matter of such petition may relate, and the same shall be prosecuted in the Court in which the same shall be intituled." . . . . The practice is laid down thus in the Yearly Practice, 1920, p. 802, under the heading "Steps before filing": "The petition must be left with the Secretary of State for the Home Department for the purpose of being submitted to the Sovereign for the endorsement of his fiat 'Let right be done.' . . . . A copy bearing such fiat must be taken to the Writ Department of the Central Office, together with a copy or copies for service. A number is given, and if in the Chancery Division, a judge is assigned, and the copy bearing the fiat filed in the Department." That is the practice. In my opinion, it cannot be said that a legal proceeding has been commenced in the Court until the steps indicated by the statute and the practice consequent on the granting of the fiat have been taken and pursued.

The second point, which is also of general importance,

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

Bankes, L.J.

is this: that when a proceeding has been commenced in the Court, there is no power to remove it from that Court in which it has been instituted and refer it to arbitration. To decide this point it is necessary to examine ss. 3, 4 and 7 of the Petition of Right Act, 1860. Sect. 3 has already been referred to; the latter part of it is important; after the petition and fiat have been left with the Solicitor to the Treasury and have been by him transmitted to the proper department "the same shall be prosecuted in the Court in which the same shall be intituled, or in such other Court as the Lord Chancellor may direct." To s. 4, which prescribes the time for answering, pleading or demurring, there is a proviso: "Provided always, that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General, or of the suppliant, to change the Court in which such petition shall be prosecuted, or the venue for the trial of the same." The argument for the Crown is that these two sections are imperative and that, unless the Lord Chancellor otherwise orders, the petition must be prosecuted in the Court in which it is intituled and the venue must be that stated in the margin of the petition. On the other hand it is urged that these provisions are subject to the general provisions of s. 7 which provides that "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right." I see nothing in the Arbitration Act, 1889, either in s. 4 of that Act or elsewhere, inconsistent with the provisions of ss. 3 and 4 of the Petition of Right Act, 1860. It may be that an application to transfer the petition of right from one Court to another

Court, or to change the venue, must be made to the Lord Chancellor. The present application is of another kind. It is an application to apply s. 4 of the Arbitration Act, 1889, to this petition of right. Its object is not to change either the Court or the venue; it is to invoke the jurisdiction conferred by the Arbitration Act, 1889, upon the Court to order, in certain cases and circumstances, that the parties, having agreed to refer a matter to arbitration, shall proceed to arbitration as the proper means of determining the matter in dispute, and that as a consequence the proceedings in the Court shall be stayed. On this point also the argument for the respondent fails.

The third and fourth points affect this particular case. As to the third, the respondents contend that there was here no submission to arbitration. It is a condition precedent to any application under s. 4 of the Arbitration Act, 1889, that there should be a submission to arbitration by both parties to the dispute. A submission is defined by s. 27 of the Arbitration Act in these terms: "Unless the contrary intention appears, 'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." It is not necessary that both parties should have signed the written agreement; if a person has accepted a written agreement and acted upon it he is bound by it for this purpose, although he may not have set his hand to the document: *Baker* v. *Yorkshire Fire and Life Assurance Co.* (1) The law is clearly and accurately stated by Astbury J. who reviewed all the authorities in *Hickman* v. *Kent or Romney Marsh Sheep Breeders' Association.* (2) He says: "The result of these decisions is, I think, that if the submission is in writing and is binding on both parties as their agreement, or as the equivalent in law to an agreement between them, the statute is satisfied." It is said that in the documents which the Crown present to the Court there is an agreement binding on both parties as their agreement in reference to the requisition of these

(1) [1892] 1 Q. B. 144. (2) [1915] 1 Ch. 881, 902.

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

Bankes L.J.

steamers and the hire to be paid for them. In my opinion no such agreement can be made out. The documents leave the requirements of the Government in such doubt that no Court could take them as constituting a clear agreement with a submission to arbitration. The Proclamation of August 3, 1914, gave the Admiralty authority to requisition British ships on condition that the owners should receive payment for their use and for services rendered during their employment "and compensation for loss or damage thereby occasioned, according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners or failing such agreement by the award of a Board of Arbitration to be constituted and appointed by Us for this purpose." The Board of Arbitration was constituted. It is suggested that the owners, the respondents, have agreed to submit this particular dispute to the Board of Arbitration. Of the letters referred to in the affidavit of the Solicitor to the Treasury there are three substantially in the same form. The first is dated January 22, 1917, and signed on behalf of the Lords Commissioners of the Admiralty. It runs thus: "I am commanded by my Lords Commissioners of the Admiralty to acquaint you that it has been found necessary to requisition the ss. *Cranley* under Royal Proclamation of August 3, 1914, for use on urgent Government service under the conditions of the pro forma charterparty T. 99 enclosed." Now the Royal Proclamation indicates that, failing an agreement, the amount of payment for hire and the amount of compensation shall be settled by the Board of Arbitration to be constituted under the Proclamation. The pro forma charterparty T. 99 by clause 31, instead of an arbitration before the Board of Arbitration, provides that "any dispute arising under this charter shall be referred under the provisions of the Arbitration Act, 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and, should such arbitrators be unable to agree, the decision of an umpire

whom they must elect shall be final and binding upon both parties." It is useless to urge that this clause has in practice been taken as applying to disputes differing in kind from that which is before us. In truth the document which the Crown presents as an agreement says in one breath "This vessel is requisitioned on the terms of the Proclamation," and in another "This vessel is requisitioned on the terms of charterparty T. 99"; and the two are irreconcilable. Unless there is an assent to one or the other of these tribunals no agreement is established. It is not sufficient to say that the owners have allowed their vessel to be taken; their mere acquiescence is not an agreement that there shall be a reference to the Board of Arbitration constituted under the Proclamation. The position of the Crown is not strengthened by what follows. The letter goes on to say: "Rates of hire have been fixed for requisitioned ships on the basis of the reports of the Admiralty Transport Arbitration Committee subject, in the case of certain classes of vessels, to subsequent modifications (vide form T. 11541 attached)." That document is attached. It shows an agreement come to by certain persons, not in a position to bind the respondents in any way, to accept certain rates of hire per ton gross register, subject to subsequent modifications. It goes on to say: "Payments on account on this basis will be made to you as soon as possible on receipt of a claim therefor." The form of that letter, the requisitioning of the ships without objection, and the acceptance of payment on account are altogether insufficient to establish an agreement upon the terms suggested by the Crown.

That in itself is enough to dispose of this appeal. But there is further the grave constitutional question whether the Proclamation can validly require that the amount payable to the owners shall in default of agreement be ascertained by an award of the Board of Arbitration. That challenges the validity not only of the alleged agreement to refer, but of the agreement on which this petition is based. We must exercise our discretion by refusing to withdraw such a question as that from the consideration of the Courts.

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

On these last two grounds the appeal fails and must be dismissed.

WARRINGTON L.J. I am of the same opinion. This is an appeal from an order of Bailhache J. in chambers refusing to stay proceedings in a petition of right pursuant to s. 4 of the Arbitration Act, 1889. Two questions have been raised: the first, a general question, whether after the King's fiat has been given to a petition of right there is any jurisdiction in the Court under s. 4 of the Arbitration Act to stay further proceedings on the petition; the second, a question affecting this particular case, whether there has or has not been a submission to arbitration and, if there has been, whether the suppliant has or has not shown sufficient reason why the matter should not be referred in accordance with the submission.

This first is a question of great general importance. To my mind if there were no jurisdiction such as the Crown invokes here, it would be a most unfortunate thing for the subject; for then the advisers of the Crown before a fiat was granted would have to consider whether or not the case was one which ought in their opinion to be referred to arbitration and, if they thought it ought to be referred, it would be competent to them to refuse the fiat and so leave the suppliant without the power of recourse to the Courts.

The existence of the jurisdiction depends upon s. 4 of the Arbitration Act, 1889. Before that section applies, certain conditions must be fulfilled. First, there must be a submission; secondly, a party to the submission must commence legal proceedings in a Court against another party to the submission; thirdly, that party must not have delivered pleadings or taken any other step in those proceedings. If those conditions are fulfilled then that party to the proceedings may apply to the Court to stay them in order that the question may be referred to arbitration.

I pass over for the moment the first of these conditions,

that there must be a submission, and I proceed to deal with the others. The second is that legal proceedings must have been commenced. When is a legal proceeding commenced in a petition of right? The petition itself is, in accordance with the Petition of Right Act, 1860, a petition addressed to the King, and the prayer of the petition is not for the relief claimed by the suppliant. The prayer of the petition is: "Your suppliants therefore humbly pray that Your Majesty may be graciously pleased to direct this petition to be indorsed with Your Majesty's fiat 'Let right be done.'" Then by s. 3 of the Act, upon the fiat being obtained, a copy of the petition and fiat are to be left—that is by the suppliant or his advisers—at the office of the Solicitor to the Treasury with an indorsement thereon in the form or to the effect in the Schedule No. 2. That indorsement is that "The suppliant prays for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof or otherwise that the petition may be taken as confessed." According to the practice now pursued in these cases the petition, when so left at the office of the Solicitor to the Treasury, is taken to the Central Office of the Court and is there filed.

In my judgment the presentation of the petition to the King is not a legal proceeding at all. It is a petition praying the King to allow legal proceedings to be taken. When he has given his fiat, then the legal proceedings are commenced by leaving the petition with the Solicitor to the Treasury, which is equivalent to serving a writ upon an ordinary defendant, and by filing the petition, with the indorsement upon it, in the Central Office. No legal proceedings are therefore commenced by merely presenting the petition and obtaining the fiat. It follows that the granting of the fiat is not a step in any legal proceedings. Therefore on the general question I am of opinion that the Court had jurisdiction to entertain an application under s. 4 of the Arbitration Act, 1889, notwithstanding that the fiat had been given.

But when that point has been decided in favour of the

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

Warrington L.J

Crown there is the further question whether there is jurisdiction to stay these particular proceedings. That depends upon the provisions, and particularly ss. 3, 4 and 7, of the Petition of Right Act, 1860. Sect. 3 provides that after the transmission of the petition to the particular department to which the subject matter of the petition may relate "the same shall be prosecuted in the Court in which the same shall be intituled, or in such other Court as the Lord Chancellor may direct." Sect. 4 provides that "It shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the Court in which such petition shall be prosecuted, or the venue for the trial of the same." Then s. 7, to my mind the most important section, enacts: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act." In my opinion ss. 3, 4 and 7 must be read together. The argument for the respondent is that by ss. 3 and 4 the action must be prosecuted in the Court in which the petition is intituled, unless the Lord Chancellor makes an order under s. 4. But in my opinion even if that is so, if the action is prosecuted in the Court in which the petition is intituled, it is prosecuted there subject to the provisions of s. 7, which imports into the proceedings instituted by the petition all the rules, statutory and otherwise, of procedure and practice which are

applicable to that Court. Among those rules is the statutory provision of s. 4 of the Arbitration Act, 1889, giving the Court jurisdiction in a proper case to stay the proceedings in that Court with a view to submitting the question to arbitration. The first question therefore, namely, whether the Court had jurisdiction to make an order staying these proceedings, must be decided in favour of the Crown.

Then come considerations special to this particular case. First, has there in fact been in this case a submission to arbitration? In my opinion there has not. The Crown relied upon two letters in particular addressed on behalf of the Lords Commissioners of the Admiralty to the owners of these two ships, in identical terms, each acquainting the owner of the ship that it had been found necessary to requisition the ship "under Royal Proclamation of August 3, 1914, for use on urgent Government service under the conditions of the pro forma charterparty T. 99 enclosed." After a paragraph which need not be read, the letter goes on: "Rates of hire have been fixed for requisitioned ships on the basis of the reports of the Admiralty Transport Arbitration Committees subject, in the case of certain classes of vessels, to subsequent modifications (vide form T. 11541 attached). These rates have been generally accepted by shipowners, and payments on account on this basis will be made to you as soon as possible on receipt of a claim therefor." Charterparty T. 99, which was enclosed, is a charterparty which, if it had been signed, would have been signed only after the rate of hire had been agreed, because clause 5 is in these terms: "The Admiralty agree to pay for the use and hire of the said steamer at the rate of *l.* per calendar month commencing when she is placed at Admiralty disposal as provided by clause 4." It contains also clause 31 relating to disputes arising under the charterparty and their reference to arbitration. But inasmuch as the charterparty, if signed, would have stated the amount of hire no question of that amount would have come under clause 31, because it would have been fixed already. As it is we must turn back to the Proclamation, the effect of which is to impose on the shipowner the obligation

C. A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

Warrington L.J.

either of agreeing with the Admiralty the amount he is to receive for use and hire of his ship and compensation for loss or damage thereto, or of accepting the amount determined by the award of the Board of Arbitration to be constituted and appointed by the Sovereign for the purpose. That Board of Arbitration has now been appointed, and is called the Admiralty Transport Arbitration Board.

Now as far as the evidence goes, the only thing that happened after the owners received that letter was that the ships were handed over to the Admiralty. As to the terms on which they were handed over nothing appears except that they were requisitioned under the terms of the Proclamation. But if the Proclamation is a valid one the owner could not help himself. In these circumstances there is no sufficient evidence of an agreement that the ships shall be used by the Government upon terms of remuneration to be settled by the Admiralty Transport Arbitration Board.

But assuming that there is a submission to arbitration, I am clearly of opinion that the suppliants have shown sufficient reason why this case should not be referred. The case raises the serious question whether it was competent for the Crown by Proclamation to impose upon the subject the necessity of submitting his claim for compensation to this particular Arbitration Board; that is to say, the question whether or not the Proclamation of August 3, 1914, was valid and effectual. The contention for the Crown is that the determination of the amount either by agreement or by an award of this Arbitration Board is a condition precedent to any legal proceedings to recover compensation. The suppliants dispute that contention of the Crown, and until this difference has been decided against the suppliant it is impossible to stay the proceedings in which it is raised. For these reasons I think the appeal of the Crown fails and that the order of Bailhache J. should be affirmed.

SCRUTTON L.J. I agree that this appeal should be dismissed, but as the reasons which lead me to that conclusion

are not quite the same as those which have guided my brothers, I think it right to state them shortly. One of the points argued below was that this petition of right did not come within s. 4 of the Arbitration Act, 1889, at all, either because a step—namely, the granting of the fiat—had been taken or because s. 4 did not apply to proceedings against the Crown. On this point I desire to express no opinion one way or the other. I think there is considerable doubt as to the meaning of ss. 4 and 23 of the Arbitration Act. Sect. 4 by itself clearly does not bind the Crown. Statutes do not bind the Crown unless the Crown is mentioned. The wording of s. 23, which applies not to submissions but to arbitrations, is not such as to satisfy me that the combined effect of s. 4 and s. 23 is to make the former applicable to proceedings against the Crown. Again I express no opinion as to whether ss. 4 and 7 of the Petition of Right Act, 1860, apply the provisions of the Arbitration Act to Crown proceedings. On these points I do not assent to neither do I dissent from what has been said by the other members of the Court.

I assume for the purposes of this case that after a fiat has been granted a petition of right is in the same position as an ordinary action. In order to refer an ordinary action to arbitration under s. 4 of the Arbitration Act a binding submission or agreement to refer must be found. In this case the advisers of the Crown have failed to tell us what happened. There was the Proclamation of August 3, 1914, and we have seen certain letters from the Admiralty to the shipowners; but what the shipowners did after getting those letters, by what ways and means their ships were placed at the disposal of the Crown or taken by the Crown, we have no information, and cannot form an opinion as to whether there was or was not an agreement between the Crown and the shipowners.

The Crown issued a Proclamation of August 3, 1914, authorizing the Lords Commissioners of the Admiralty to requisition British ships on condition that the owners should receive payment to be fixed by agreement, or, failing agree-

C.A. 1919

ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY v. THE KING.

Scrutton, L.J.

ment, by the award of a Court of Arbitration appointed by the Crown; that is to say, appointed by one of the parties to the supposed arbitration and not by the other. The petition of right by para. 10 directly challenges the efficacy of that proceeding and claims that the shipowners are entitled by reason of the requisition to a reasonable rate of remuneration for the vessels, without making any admission as to how it should be fixed. That raises the question whether the Crown has power not only to requisition vessels but to appoint of its own motion the tribunal to assess the amount to be paid for them. That matter is not covered by any submission and even if it were it is far too important a matter to submit to a tribunal of two shipowners and a legal member. It is matter for discussion in public in the King's Courts. This consideration is quite enough to lead me to dismiss this appeal. On the other points I say nothing; because on the first I have formed no opinion, and on the second from want of facts I can form no opinion.

Appeal dismissed.

Solicitor for the Crown: *The Treasury Solicitor.*
Solicitors for the respondents: *William A. Crump & Son.*

W. H. G.

COMMISSIONERS OF HIS MAJESTY'S WORKS AND PUBLIC BUILDINGS *v.* PONTYPRIDD MASONIC HALL COMPANY, LIMITED.

1920
Mar. 25, 26.

[1916. W. 1095.]

Limitations, Statute of—Action by Government Department—Agents of Crown —Whether Statute applies.

The plaintiffs entered into an agreement with the defendants for the use of the defendants' hall for county court purposes. After some years the term was surrendered by operation of law, but by inadvertence the plaintiffs continued to pay rent for the hall. To a claim by the plaintiffs to recover the sums so paid as money paid under a mistake of fact the defendants pleaded the Statute of Limitations:—

Held, that notwithstanding the fact that the plaintiffs were an incorporated body, they were mere agents of the Crown in the matter, and therefore, as the Statute of Limitations does not bind the Crown, it afforded no answer to the claim.

ACTION tried by Bankes L.J. sitting as a judge of the King's Bench Division.

The plaintiffs claimed to recover from the defendants 281*l.* 5*s.* as money paid under a mistake of fact. In 1888 the defendants let for seven years to the plaintiffs, at a rent of 25*l.* per annum, their masonic hall for use on certain days in connection with the work of the county court at Pontypridd. At the expiration of the seven years it was agreed that the plaintiffs' occupation of the hall should be continued on an annual tenancy, but terminable by six months' notice expiring on any quarter day. In 1904 the use of the hall for county court purposes was in fact given up, but no notice to terminate the tenancy was given to the defendants, and by inadvertence the plaintiffs continued to pay rent till 1916. The plaintiffs, contending that the tenancy was surrendered by operation of law in 1904, now claimed to recover the amount of rent paid since that date till 1916. The defendants denied that there was any surrender, and relied upon the Statute of Limitations, 21 Jac. I. c. 16. The plaintiffs replied that the Statute of Limitations did not

1920

PUBLIC WORKS COMMISSIONERS v. PONTYPRIDD MASONIC HALL COMPANY.

bind the Crown or the plaintiffs as servants and agents of the Crown.

The Lord Justice found on the facts that there was a surrender by operation of law, not in 1904, but in November, 1909.

Lowenthal (*Sir Gordon Hewart A.-G.* with him) for the plaintiffs. The plaintiffs sue as servants of the Crown: per Phillimore J. in *Graham* v. *Public Works Commissioners* (1) and *Roper* v. *Public Works Commissioners* (2); and that being so it is clear that the Statute of Limitations does not apply, the principle being that where the Crown is not named in a statute it is not bound thereby. The mere fact that the plaintiffs are incorporated does not affect the question.

Holman Gregory K.C. and *Herbert-Smith* for the defendants. The Statute of Limitations applies. The incorporation of the plaintiffs by 15 & 16 Vict. c. 28 makes them a distinct entity, and they come into Court with the rights and liabilities of ordinary litigants. In *Graham* v. *Public Works Commissioners* (1), Ridley J. held that the Commissioners must be taken to have made the contract there in question themselves and not as agents of the Crown. The position might be different if the Treasury were suing, but it was as a corporate body that the plaintiffs contracted with and paid the money to the defendants. They cannot, therefore, be treated as the Crown. *Roper* v. *Public Works Commissioners* (2) does not assist the plaintiffs.

Lowenthal replied.

BANKES L.J. stated the facts and continued: The defendants plead the Statute of Limitations. To that the plaintiffs answer that they are suing as the representatives of the Crown to recover this money, and that the Statute of Limitations does not apply as against the Crown. Two cases have been referred to, *Graham* v. *Public Works Commissioners* (1) and *Roper* v. *Public Works Commissioners* (2), both of which make it clear that if a body, whether

(1) [1901] 2 K. B. 781. (2) [1915] 1 K. B. 45.

1920

PUBLIC WORKS COMMISSIONERS v. PONTYPRIDD MASONIC HALL COMPANY.

Bankes L.J.

incorporated or not, is in fact acting in any particular matter as agents of the Crown, they are to be treated in law as such agents, and from that it follows that the Statute of Limitations does not apply to them. In this case I have no hesitation in coming to the conclusion that the plaintiffs are merely acting in their capacity as agents of the Crown in endeavouring to recover this money, although they possess a statutory right to bring the action in their own name. In *Dixon* v. *Farrer* (1), Lindley L.J., dealing with a case where the Secretary of the Board of Trade was being sued, said (2) that the defendant was "a nominal defendant sued as representing one of the departments of the State." Here the position is transposed: the plaintiffs are nominal plaintiffs suing as representing one of the departments of the State. There will be judgment for the plaintiffs for 156*l.* 5*s.*

Judgment for plaintiffs.

Solicitor for plaintiffs: *Treasury Solicitor.*

Solicitors for defendants: *Helder, Roberts, Giles & Walton, for W. R. Davies & Co., Pontypridd.*

J. S. H.

[COURT OF CRIMINAL APPEAL.]

C. A.

1920

Feb. 23.

THE KING *v.* GEORGE STANLEY.

Criminal Law—Habitual Criminal—Evidence—Previous Conviction as habitual Criminal—Sentence—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-ss.* 1, 2 (*b*).

Where a person who has been found to be a habitual criminal and has been sentenced to preventive detention subsequently commits another crime, the jury must, under s. 10, sub-s. 2 (*b*), of the Prevention of Crime Act, 1908, upon proof of the previous conviction of the accused person as a habitual criminal, and without proof that he has since the date of the previous conviction been leading persistently a dishonest or criminal life, find him to be a habitual criminal. But where a person

(1) (1886) 18 Q. B. D. 43. (2) Ibid. 51.

C. A. 1920

REX v. GEORGE STANLEY.

has been found by a jury to be a habitual criminal the Court is not bound to pass a sentence of preventive detention; s. 10, sub-s. 1, of the Act of 1908 gives the Court a discretion with regard to the matter, and it ought, before passing a sentence of preventive detention, to take into account the life the accused person has been living.

APPEAL against sentences for shopbreaking and as a habitual criminal.

The prisoner, who was convicted at the London Sessions of breaking and entering a shop with intent to steal, was also charged with being a habitual criminal, the ground for so charging him being thus stated in the notice served upon him: "That on July 26, 1910, you were at the County of London Adjourned Quarter Sessions convicted of a crime within the meaning of s. 10 of the Prevention of Crime Act, 1908 (1), and that on such conviction you were found by the jury to be a habitual criminal and were then sentenced to five years' preventive detention." This conviction being proved, the jury found the prisoner guilty. The deputy chairman had previously said that there were two provisions in the Act. In one it was necessary to prove that the prisoner had been leading persistently a dishonest and criminal life, but there was an alternative; if he had already been convicted as a habitual

(1) The Prevention of Crime Act, 1908, s. 10, sub-s. 1: "Where a person is convicted on indictment of a crime, committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention. . . . . "

Sub-s. 2: "A person shall not be found to be a habitual criminal unless the jury finds on evidence—

(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

(*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention."

criminal nothing more was wanted. He directed the jury that they had no option in the case; the prisoner had been previously convicted of being a habitual criminal, and they had nothing to do except to find him guilty.

Evidence was given that the prisoner had, previous to his conviction on July 26, 1910, been convicted seven times for larceny.

He came out of prison in September, 1916, from serving the sentences of penal servitude and preventive detention passed upon him in July, 1910. He then worked for three weeks and joined the Army in October, 1916, and served in France. He was invalided home in April, 1917, and was afterwards transferred to the Royal Air Force. He was demobilized in January, 1919, with a character marked very good. He had been given the General Service and the Allied Medals. Since coming out of the Army he had been to the Labour Bureau on several occasions, and had made efforts to obtain work, but unsuccessfully.

He was sentenced by the deputy chairman to three years' penal servitude for breaking and entering a shop with intent to steal, and to five years' preventive detention as a habitual criminal.

The prisoner appealed against both sentences.

The Appellant in person.

A. P. Poley for the Crown. The question upon which the opinion of this Court is desired is whether, when the prosecution have proved, in accordance with s. 10, sub-s. 2 (*b*), of the Prevention of Crime Act, 1908, that the accused person has on a previous occasion been found to be a habitual criminal and sentenced to preventive detention, it is open to the accused person to call rebutting evidence to show that he has not been living persistently a dishonest or criminal life, and that therefore he does not come within the definition of a habitual criminal, or whether the jury is bound, upon proof of the previous conviction of the accused person as a habitual criminal and sentence upon him of preventive detention, to convict him again as a habitual criminal notwithstanding that he has

C. A. 1920

REX v. GEORGE STANLEY.

been living an honest life since coming out of prison. In *Rex* v. *Davis* (1) it was held that it was sufficient to prove that the accused person has been previously found to be a habitual criminal and sentenced to preventive detention without also proving that he has been leading persistently a dishonest or criminal life. The question whether or not the prisoner might call evidence to prove that he is not a habitual criminal was however not raised in that case. It was there contended on behalf of the prisoner that the onus lay on the Crown affirmatively to make out that the prisoner was leading persistently a dishonest or criminal life. No evidence was called by the prisoner to show his mode of life.

[SHEARMAN J. If this Court were to hold that a jury may after proof of the previous conviction of the accused person as a habitual criminal and sentence of preventive detention nevertheless take into account the life he has led in the interval between the conviction and the second offence the result would be that this Court would virtually reverse the decision in *Davis's Case.* (1) Sub-s. 2 of s. 10 says "a person shall not be found to be a habitual criminal unless the jury finds on evidence" either (*a*) or (*b*). Those words must mean that a person shall be found to be a habitual criminal if the jury finds either (*a*) or (*b*) but shall not be found to be a habitual criminal unless they do so find. If the jury after hearing evidence under sub-s. 2 (*b*) that on a previous conviction he has been found to be a habitual criminal and been sentenced to preventive detention is nevertheless entitled to say that it does not find the accused person to be a habitual criminal it would equally be entitled so to find after evidence under sub-s. 2 (*a*) that he had been convicted three times previously and that he was leading persistently a dishonest or criminal life. There is however no real hardship in this construction of the section because after a man has been found to be a habitual criminal the Court has under s. 10, sub-s. 1, a discretion whether or not it will pass upon him a sentence of preventive detention. The Court only passes such a sentence if it is of opinion that by reason of the accused

(1) [1917] 2 K. B. 855.

person's criminal habits and mode of life it is expedient for the protection of the public that he should be kept in preventive detention. The Court can then go into the facts as to the life the man has been living.]

Poley. That is the contention of the Crown.

The judgment of the Court (Earl of Reading C.J., A. T. Lawrence and Shearman JJ.) was delivered by

EARL OF READING C.J. The appellant was convicted of breaking and entering a shop with intent to steal, and he was also convicted under the Prevention of Crime Act, 1908, of being a habitual criminal. He was sentenced to three years' penal servitude for the offence of shopbreaking, and to five years' preventive detention as a habitual criminal. He appeals to this Court against both sentences, but he does not appeal against his conviction.

The first point to which attention has been directed is as to the effect of s. 10, sub-s. 2 (*b*), of the Prevention of Crime Act, 1908. The Legislature by that statute gave power to the Court when a person has been found by the jury to be a habitual criminal, and a sentence of penal servitude has been passed upon him, to pass a sentence of preventive detention for a period of from five years to ten years in addition to the sentence of penal servitude. By sub-s. 2 it is enacted that a person shall not be found to be a habitual criminal unless it is found by the jury on the evidence that he had been convicted three times before the conviction for the crime for which he was then being tried, and—and this is important—that he was leading persistently a dishonest or criminal life. The Court has already had to deal with the meaning of those words, and the proper way of applying them in these cases, and nothing need be said with regard to them in this case. Under sub-s. 2 (*b*) however there is an alternative mode of procedure, that is, if the jury finds "that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention." This Court has had to consider the meaning of that sub-section in *Rex* v. *Davis* (1) and also in the

(1) [1917] 2 K. B. 855

C. A. 1920

REX v. GEORGE STANLEY.

Earl of Reading [C.J.

case of *Rex* v. *Collins* (1), which is referred to in *Davis's Case* (2) but appears to be unreported, and it came to the conclusion, as appears from the judgment delivered by Sankey J., that although it was possible that the construction then placed on the sub-section by the Court might work hardship, nevertheless the Court considered that it was bound by what Parliament had done, and that if Parliament thought that the Court was not expressing the view intended by the Legislature the matter could be remedied by the Legislature. What the Court held in both those cases was that when there had been a previous conviction of a person as a habitual criminal upon proof of that fact, and also of the fact that he had been sentenced to preventive detention, then the jury shall find him guilty. That is we think the true meaning of the sub-section. The Crown has very properly brought the matter to our notice in a way in which the appellant could not, being unrepresented by counsel. The matter involved is one of some importance as affecting those persons who may be charged as habitual criminals; but the conclusion to which we have come is that the view indicated by Sankey J. in *Davis's Case* (2) is the right view, and that once it has been proved that the accused person has been previously convicted as a habitual criminal, and also that he has been sentenced to preventive detention, that is all that is necessary, nothing more need be proved, and the conviction of the person as a habitual criminal must follow.

But that does not dispose of the matter, because the conviction of a person as a habitual criminal is only of importance for the purpose of enabling the Court to sentence the person to a term of preventive detention. There is no power in the Criminal Courts to sentence a man to preventive detention in addition to the punishment for the crime in respect of which he has been convicted, save under this Act which has introduced a new form of detention not as a matter of punishment but as a protection of the public, and also to afford opportunities for the reform of a person who has within the meaning of

(1) Unreported. (2) [1917] 2 K.B. 855.

the Act habitually spent his life in crime. It therefore becomes necessary to see whether when a person is properly convicted of being a habitual criminal, as this appellant was, the Court is bound to pass a sentence of preventive detention. The offence in this case was that of breaking and entering a shop with intent to steal; nothing however was in fact stolen. In view of the prisoner's record of crime the Court before whom he was tried felt bound, more especially having regard to the observations made in *Rex* v. *Davis* (1), to pass a sentence of preventive detention after having passed a sentence of three years' penal servitude upon him. I will not go through the appellant's record of crime, it is sufficient to say that he had been convicted of being a habitual criminal before he was charged with the offence in this case, and before he was charged in this case with being a habitual criminal and consequently he became amenable to the jurisdiction of the Court, which could if it thought fit sentence him to preventive detention for a term of five years. In my view it does not follow because a person has been found by a jury to be a habitual criminal that the Court must pass upon him a sentence of preventive detention; under s. 10, sub-s. 1, of the Act it has a discretion with regard to the matter; indeed the language of the Act shows this, because it provides that where a sentence of penal servitude has been passed upon the accused person the Court, if it is "of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may"—observe the word used is not "shall"—"pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for" a period of preventive detention. That leaves it entirely discretionary as to whether or not the Court should pass such a sentence. We desire to say that although we agree entirely with the decisions in *Rex* v. *Davis* (1) and *Rex* v. *Collins* (2) neither of those cases decides, nor is it in our opinion the law, that the Court must pass a sentence of preventive detention.

(1) [1917] 2 K. B. 855. (2) Unreported.

C. A. 1920

REX v. GEORGE STANLEY.

Earl of Reading C.J.

We must therefore examine the facts of this case and see whether these are circumstances proper to be taken into account in the appellant's favour, and whether we think it is necessary for the protection of the public that he should be sentenced to preventive detention. We have come to the conclusion, dealing with the sentence of preventive detention by itself, that this is a case in which the Court ought not to have imposed a term of preventive detention, but ought to have taken into account the life that the appellant has lived since he came out of prison, and in particular his record in the Army, where he appears to have earned a very good character, and to have done his best to redeem his past. These facts ought to weigh in his favour, and we think that he ought not to have been sentenced to the term of preventive detention, and that sentence of five years will therefore be quashed. It is right to say that the deputy chairman who sentenced him thought that he was bound by the authorities so to construe the Act of Parliament that a sentence must be passed.

That leaves us to deal with the sentence of penal servitude which is a condition precedent to the right to impose a sentence of preventive detention. We have come to the conclusion, having regard to the appellant's record since he came out of prison, that a sentence of three years' penal servitude is too severe, and that a sentence of twelve months' imprisonment with hard labour is sufficient punishment for the offence which he committed, taking into account all that has happened.

Sentence of preventive detention quashed.
Sentence of penal servitude reduced.

Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.
1920

ROTHSCHILD *v.* FISHER.

[1918. R. 973.]

ROTHSCHILD
v.
FISHER.

ROTHSCHILD *v.* FISHER (FISHER, THIRD PARTY).

[1919. R. 48.]

Husband and Wife—Married Woman—Debts contracted before Marriage—Settlement—Restraint on Anticipation—Judgment Debt—Marriage after Commencement of Action but before Judgment—Merger—Receiver—Splitting up Judgment Debt—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), s. 19.

By s. 13 of the Married Women's Property Act, 1882, a woman after her marriage shall continue liable in respect and to the extent of her separate property for "all debts contracted . . . . by her before her marriage." By s. 19, nothing in this Act shall affect any settlement made respecting the property of any married woman, or render inoperative any restriction against anticipation; but no restriction made in any settlement of a woman's own property to be made or entered into by herself shall have any validity against "debts contracted by her before marriage."

On December 19, 1919, the plaintiff recovered judgment for 1114*l.* 9*s.* 8*d.* and costs against the defendant as one of the guarantors under a deed dated September 23, 1916, as varied by a deed dated December 5, 1916. Subsequently to the commencement of the action but before the date of the judgment the defendant married, and by an ante-nuptial settlement settled six debentures of 500*l.* each to which she was entitled upon the usual trusts for herself for life for her separate use without power of anticipation and after her death for the benefit of her husband and the issue of the marriage. The debentures so settled were subject to a charge given by the defendant to her solicitor for his costs. On February 5, 1920, the plaintiff obtained from the Master an order appointing him receiver of any interests the defendant might have in the debentures, whether under the settlement or not, but without prejudice to the rights of any prior encumbrancers. On appeal by the defendant A. T. Lawrence J. rescinded the order of the Master on the ground (inter alia) that the effect of the judgment was to merge the contract debt in the judgment debt, and therefore that the judgment debt was not "a debt contracted by her before marriage" within the meaning of s. 19 of the Married Women's Property Act, 1882. On appeal:—

Held (reversing on this point the decision of A. T. Lawrence J.), that the judgment did not have the effect of merging "the debt contracted

C. A. 1920

ROTHSCHILD v. FISHER.

by her before marriage" in the judgment debts so as to take it out of the operation of the proviso to s. 19.

But *held*, following *Forster* v. *Baker* [1910] 2 K. B. 636, that the plaintiff could not split up into different parts his judgment debt which included both interest which had accrued due before and interest which had accrued after the date of the marriage.

Held, therefore, that the case was one in which a receiver ought not to be appointed.

Decision of A. T. Lawrence J. affirmed.

APPEAL from a decision of A. T. Lawrence J. in chambers.

In 1907 one Fisher who carried on a moneylender's business died intestate leaving his widow and four children the defendants, Philip Barnett Fisher, Mrs. Addie Bernstein, Mrs. Gwendolen Beck and Jessie Fisher surviving him. Letters of administration to his estate were taken out, but the defendants who were entitled to be paid their shares of the estate allowed the whole and in some cases a portion of their money to remain in the hands of their mother Mrs. Fisher in the business which she carried on in succession to their father.

Mrs. Fisher died in 1916, having by her will bequeathed her residuary estate to trustees upon trust for her son the defendant, P. B. Fisher, subject to certain conditions. These conditions were that he should convert the business into a limited company and should give to each of his sisters in satisfaction of her debt first debentures in the company to be so formed. A company called F. Fisher, Ld., was accordingly formed shortly after Mrs. Fisher's death, and the defendant, Jessie Fisher, received in satisfaction of her debt six first debentures in the company of 500*l*. each, bearing interest at the rate of 6 per cent. per annum.

In carrying on the business Mrs. Fisher had incurred a considerable debt to the plaintiff, who shortly after her death and before the formation of the company commenced an action for the administration of her estate. The action was compromised on the terms of the defendant P. B. Fisher undertaking to pay the principal debt and interest, and the defendants Jessie Fisher, Mrs. Bernstein, Mrs. Beck and her husband D. W. Beck, agreeing to guarantee the payment.

The compromise was carried out by a deed dated September 23, 1916, which was subsequently varied as regarded the date of payment and the amount of interest by a deed dated December 5, 1916.

The interest due under the deeds having fallen into arrear the plaintiff, in 1918, commenced the first action against the defendants as parties to the deeds for the amount of the interest then due, and in January, 1919, he commenced the second action against the same defendants to recover 938*l.* 5*s.* for principal and interest then due. The two actions were subsequently consolidated.

The defendants P. B. Fisher and Mrs. Bernstein delivered no defence, and judgment under Order XIV. was signed against them.

On October 19, 1919, whilst the action was pending, the defendant Jessie Fisher intermarried with Walter Lionel Joseph.

By an ante-nuptial settlement dated October 16, 1919, and made between W. L. Joseph of the first part, the defendant Jessie Fisher of the second part, and S. Samuel and B. C. Joseph as trustees of the third part, W. L. Joseph assigned a policy of assurance on his life and the defendant Jessie Fisher assigned the six debentures in question to the trustees to hold on the trusts therein mentioned. The trusts of the wife's fund were to pay the income to the wife for life for her separate use without power of anticipation and after her death to hold the corpus and income on the usual trusts for the benefit of the husband and issue of the marriage with an ultimate trust on failure of issue for the defendant Jessie Fisher absolutely.

On December 19, 1919, the plaintiff recovered judgment in the action against the defendants Mrs. Joseph (Jessie Fisher) and D. W. Beck and his wife for 1114*l.* 9*s.* 8*d.* and costs. The judgment as against Mrs. Joseph was drawn up in the form settled in *Scott* v. *Morley*. (1)

In the same action the defendant on a third party application recovered judgment against the defendant Mrs. Joseph under a deed by which she covenanted to indemnify him against

(1) (1887) 20 Q. B. D. 120, 132.

C. A. 1920

ROTHSCHILD v. FISHER.

anything he should be called upon to pay under his guarantee.

In February, 1920, the plaintiff applied to the Master in chambers to be appointed receiver of the debentures in question.

In support of his application he stated that since the judgment in the action inquiries had been made, and it had been ascertained that there was in the hands of a receiver appointed by the debenture holders in 1916 a sum of 850*l.* to which Mrs. Joseph was entitled but which was subject to a charge given by her to her solicitors for the costs of the action. The trustees in reply swore an affidavit setting out the provisions of the marriage settlement.

On February 12, 1920, Master Bonner made an order appointing the plaintiff receiver of "any interests which the said Jessie Joseph (sued as Jessie Fisher) may have in six mortgage debentures for 500*l.* each issued by F. Fisher, Ld., and numbered 4 to 9 inclusive, whether under the deed of settlement dated October 16, 1919, made between [the parties naming them] or not; but this is to be without prejudice to the rights of any prior encumbrancers. . . . ."

The defendant Mrs. Joseph (Jessie Fisher) appealed.

A. T. Lawrence J. in chambers rescinded the Master's order on the ground (inter alia) that the effect of the judgment was to merge the contract debt in the judgment debt, and that therefore the judgment debt was not a "debt contracted by her before marriage" within the meaning of s. 19 of the Married Women's Property Act, 1882.

The plaintiff appealed. The appeal was heard on March 8, 1920.

Horace Rowlands for the appellant. By s. 13 of the Married Women's Property Act, 1882, a woman after her marriage continues liable in respect and to the extent of her separate property for "all debts contracted . . . by her before her marriage." By s. 19 nothing in the Act is to affect any settlement made respecting the property of any married woman, or render inoperative any restriction against

anticipation; but no restriction made in any settlement of a woman's own property to be made or entered into by herself shall have any validity against "debts contracted before marriage." It is submitted that the effect of the judgment against the respondent Jessie Fisher was not to merge the debt contracted by her before marriage to the respondent. It is true that a debt is merged by a judgment in the judgment debt, but the previous debt is not extinguished for all purposes.

Apart from the question of merger the position is clear and the appellant is entitled to the appointment of a receiver. The leading authority on the subject although not precisely in point is *Jay* v. *Robinson*. (1) If the respondent is right on the question of merger the judge was wrong in rescinding the order for a receiver for some part of the 850*l*. due on the debentures represents interest accrued due before the judgment, to which therefore the restraint on anticipation did not apply: *Hood Barrs* v. *Heriot*. (2) The effect of the judgments in that case is stated very clearly by A. L. Smith L.J. in *Whiteley* v. *Edwards*. (3) It is submitted, therefore, that in any event that the judge ought to have varied the order of the Master by confining it to all income that had accrued due at the date of the judgment. Further it is submitted that there was no merger in the sense of absolute extinguishment of the original debt, although it was merged in the sense that no action could be brought upon it. The judgment merely operated as a change not of the right but of the remedy, that is to say, it became a security for the original debt. There is no decision on s. 19 of the Act of 1882, but in *London and Provincial Bank* v. *Bogle* (4), which was a decision on s. 12 of the Married Women's Property Act, 1870, it was held, in a case where a married woman had contracted a debt before marriage, that notwithstanding the restraint on anticipation the plaintiffs were entitled to recover against her separate estate the amount of their judgment debt and costs. The mere fact that the judgment in this case was obtained is, so

(1) (1890) 25 Q. B. D. 467.
(2) [1896] A. C. 174.
(3) [1896] 2 Q. B. 48, 52.
(4) (1878) 7 Ch. D. 773.

C. A. 1920

ROTHSCHILD v. FISHER.

long as it stands, conclusive evidence that there was a debt contracted before marriage.

Charles Zeffertt for the respondent. The judge was right in holding that he could not appoint a receiver. Order L., r. 15A, states the circumstances under which a receiver by way of equitable execution can be appointed. The appellant came before the Court and asked for the appointment of a receiver of property belonging to persons other than the respondent.

[LORD STERNDALE M.R. We are only dealing with the question whether the Master was right in appointing a receiver of the respondent's interest.]

The real question here is whether there was a debt to which the proviso to s. 19 applies.

[LORD STERNDALE M.R. Is the effect of merger that there never was a debt?]

The effect is that the creditor must take his remedy on the judgment as the original debt is gone. The object of s. 19 was to favour married women. Here at the date of the judgment the respondent was married.

[LORD STERNDALE M.R. If you are right, a judgment against a married woman for an ante-nuptial debt is protected by s. 19.]

The Legislature wished to protect the family. In *In re A Debtor* (1) Phillimore J. said that the principal debt was merged in the judgment and all defendants became debtors of record and no longer principals and sureties. The whole nature of the debt due to the appellant was therefore changed.

The 1114*l.* 9*s.* 8*d.* here represents not only a debt contracted before marriage, but a debt in respect of interest accrued after marriage, and it cannot be said that the debt for which the receiver was asked was an ante-nuptial debt. *London and Provincial Bank* v. *Bogle* (2) was a decision on a different Act and has no application to the present case. It was followed in *Axford* v. *Reid* (3), but in *Birmingham Excelsior Money Society* v. *Lane* (4) Cozens-Hardy L.J. said that that case was no longer an authority, because the Act on which it was

(1) [1913] 3 K. B. 11.
(2) (1878) 7 Ch. D. 773.
(3) (1889) 22 Q. B. D. 548.
(4) [1904] 1 K. B. 35, 38.

decided had been repealed. Therefore, as *Axford* v. *Reid* (1) has gone, *London and Provincial Bank* v. *Bogle* (2) has also gone.

It is submitted therefore (1.) that the proviso to s. 19 of the Act of 1882 does not apply, and (2.) that it is not shown that the respondent has any separate estate, because while the settlement stands practically everything belongs to the trustees and that the Court cannot set aside the settlement in the absence of the trustees; but that if she has separate estate it is so infinitesimal in amount that the Court ought not to overrule the refusal of the learned judge to appoint a receiver. Whether the respondent is right or not on the question of merger, the appellant is seeking to take away the whole corpus of the property comprised in the settlement without setting aside the settlement itself, and this he cannot do.

Horace Rowlands in reply.

[LORD STERNDALE M.R. What do you say as to the interest which has accrued due on the debt after the marriage ?]

The judgment for the interest is good; the only question is where the appellant can get it from.

[LORD STERNDALE M.R. Are you entitled now to take the corpus of the property ?]

Yes, under s. 13. In *Jay* v. *Robinson* (3) the Court thought that the corpus might be applied in satisfaction of the judgment debt because it was the married woman's separate property before her second marriage. The restraint on anticipation is intended to be a protection to the married woman against her husband and not a barrier against ante-nuptial creditors. The cases go to show that the separate estate of a married woman still remains liable for her ante-nuptial debts: *Chubb* v. *Stretch*. (4)

[SCRUTTON L.J. There was no restraint on alienation in that case.]

This is an attempt by a married woman to obtain freedom from her ante-nuptial debts and the Court ought not to assist her.

(1) (1889) 22 Q. B. D. 548.
(2) 7 Ch. D. 773.
(3) 25 Q. B. D. 467.
(4) (1870) L. R. 9 Eq. 555, 560.

C. A. 1920

ROTHSCHILD v. FISHER.

In re A Debtor (1) is not an authority for the proposition for which it was cited.

The order of Master Bonner should have been restricted to the interest which had accrued due up to the date of the judgment. The appellant is not seeking to split up his judgment but to split up the remedies on the judgment. It is admitted that a judgment debt cannot be split up for the purpose of assignment. The difficulty in this case will only arise when the appellant comes to enforce execution.

LORD STERNDALE M.R. This is an appeal from a judgment of A. T. Lawrence J. by which he rescinded an order of Master Bonner appointing a receiver in respect of certain property belonging to the judgment debtor, a lady who was formerly Miss Jessie Fisher and is now Mrs. Jessie Joseph.

The order made by Master Bonner, so far as it is necessary to read it, appointed the plaintiff in the action receiver of any interest which the defendant Mrs. Jessie Joseph might have in six mortgage debentures for 500*l.* issued by F. Fisher, Ld., whether under her marriage settlement or not, but provided that the order should be without prejudice to the rights of any prior encumbrancers, there being a prior encumbrancer in the form of her solicitor, who had obtained a charge upon her interest in them for the costs of the action.

The matter arose out of a debt or liability incurred by the defendant's mother to the plaintiff. The defendant, with other members of the family, had undertaken to meet that liability in this way. Her brother, Phillip Barnett Fisher, who is now, as I understand, an undischarged bankrupt, undertook the principal liability of discharging the debt, and the other defendants, including the present respondent, undertook to guarantee the payment by him of the principal debt and interest. He failed to pay, and judgment was obtained against the respondent, who had in the meantime married Mr. Joseph, in respect of the principal debt and

(1) [1913] 3 K. B. 11.

interest which had accrued both before and after her marriage.

The first point that was taken on behalf of the respondent was that a receiver could not be appointed because under s. 19 of the Married Women's Property Act, 1882, there was, at the date of the judgment, no debt contracted by her before marriage, which is the only thing to which the restraint on anticipation affords no protection, inasmuch as the debt contracted before marriage was merged in the judgment, and that the receiver was appointed in respect of that judgment and not in respect of the debt contracted before the marriage. The learned judge appears to have acted upon that view. With respect, I cannot agree with him. It would reduce the section to my mind to an absurdity. The only case in which it would operate would be where there was a judgment debt before the marriage. I think, that although no doubt for many purposes a debt is merged in the judgment, the merger does not operate to prevent both the judgment and a remedy upon it being in respect of a debt contracted before marriage within the meaning of the section.

But there are other and to my mind much more formidable objections to the order of the Master. The judgment is in respect of the principal sum and interest due upon the principal sum before the marriage, and of interest due upon the principal sum after the marriage, and it is admitted by the learned counsel for the appellant, that in respect of the interest accrued upon the principal debt since the marriage he is not entitled to a receiver upon the whole of the respondent's property, because that can only be satisfied out of interest on the debentures which had accrued before the marriage, which he says he is entitled to take under *Jay* v. *Robinson* (1) which has been cited to us, but he admits that except as regards the interest on the debentures accrued before the marriage he is not entitled to a receiver in respect of that portion of the judgment, nor yet in respect of so much of the judgment as is for costs. With regard to the rest of the judgment he says he is entitled now and here to a receiver of the corpus of the

(1) 25 Q. B. D. 467, 472.

C. A. 1920

ROTHSCHILD v. FISHER.

Lord Sterndale M.R.

debentures. Now these debentures have been settled on the marriage by a settlement which has not been impeached, and under which—without going into the particulars of it—the respondent is not entitled to an absolute interest in them, but her husband has, on her death, an interest in them, and there is also an interest of the children if any of them survive their parents. Therefore, the effect of the order, if it is to operate upon the corpus, is to take away from the husband and from possible children any interest acquired by them under a settlement which has not been set aside and which it is now sought to set aside without hearing either the husband or the trustees of the settlement. That, to my mind, cannot be done. It therefore simply remains that the utmost the appellant would be entitled to get by means of a receiver would be satisfaction, if possible, of so much of the judgment as relates to interest upon the principal debt accrued due before the marriage and of costs against so much of the interest upon the debentures as accrued due before the marriage, and for the rest of his judgment debt a receiver of the corpus, if under the ultimate limitation in the settlement the corpus ever falls in and becomes the absolute property of the respondent.

The order therefore as it stands cannot, in my opinion, possibly be maintained for the reasons I have pointed out, because it gives the appellant a remedy in respect of his debt against property which is not the absolute property of the respondent, and in order to make any order for a receiver here at all the judgment debt would have to be split up into its component parts and receivers appointed of the different parts of the respondent's interests in the property. In my opinion that ought not to be done. I will not say for the moment whether it could or could not be done, but, in my opinion, it certainly ought not to be done, and in a case of that kind I do not think an order for a receiver ought to be made. That I think is in accordance with *Forster* v. *Baker* (1), to which my attention has been called by Scrutton L.J., where this Court held that, as the original judgment creditor could only issue

(1) [1910] 2 K. B. 636.

a single execution upon his judgment, and could not split up the judgment debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment debt a right which he did not himself possess. The principle of that case seems to me to apply to the present, because by means of a receiver the appellant is here attempting to do what the Court of Appeal in that case said could not be done—namely, split up his judgment into different parts and issue separate executions upon the different interests in the property. I think therefore on that ground—which was not the ground of the decision of the learned judge—that this appeal ought to be dismissed with costs.

SCRUTTON L.J. This rather complicated case arises out of the following facts: In September, 1916, there was a compromise of a claim by the appellant against various representatives of a Mrs. Fisher, who died in 1916, and the compromise of the claim produced a principal obligation by one member of the family to pay a sum, and a guarantee of that obligation by other members of the family, including the respondent Miss Fisher. Two actions, subsequently consolidated, were then started to enforce the obligations accrued for the payment of principal and interest under the original compromise. While those actions were pending Miss Fisher married and became Mrs. Joseph, and a settlement was then made into which she brought as her share of the settlement funds certain debentures in the business originally carried on by Mrs. Fisher, and the settlement included a husband's fund and a wife's fund; while both spouses lived the wife was entitled for her separate use, with a restriction on anticipation, to the income from the two funds. On the death of either of them the interest went to the survivor, and there were the usual provisions for children. Other persons, therefore, besides Miss Fisher, now Mrs. Joseph, had interests in that property which could not be affected by proceedings against Mrs. Joseph. After that settlement and change in the interests in the property—and I may add it is not suggested that the lady contracted this marriage in order to defraud her

C. A. 1920

ROTHSCHILD v. FISHER.

Scrutton L.J.

creditors but for the legitimate motives for which one does enter into marriage—a judgment was signed against her on December 19, 1919, two months after the settlement for a sum which included the principal debt and interest up to the date of the judgment. Having obtained that judgment, the appellant endeavoured to get some satisfaction for it. He found the solicitor for Mrs. Joseph already in the field with a charge of some kind for costs, but he applied for a receiver, at first apparently in very wide terms. Master Bonner granted a receiver of Mrs. Joseph's interest in the property, and there was apparently some controversy as to how much that order carried, whether it carried the corpus of the debentures or only the interest accruing on them, or her interest in them under the settlement.

The matter came before A. T. Lawrence J. in chambers on appeal from Master Bonner, and while it is not quite clear what happened, we are told that when Mr. Zeffertt took the point that no receiver could be appointed because of the restriction on anticipation, and because the debt contracted before marriage was merged in the judgment obtained after marriage, the learned judge stopped counsel who was appealing, and reversed the decision of the Master.

Now if that was the only ground available in this case, I should respectfully have thought that the learned judge was in error. The point turns upon a few words in s. 19 of the Married Women's Property Act, 1882: "But no restriction against anticipation contained in any settlement"—and there is such a restriction in this settlement—"or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage," and what was said by the learned judge, as I understand, is that this was not a debt contracted before marriage, because any such debt had been merged in the judgment debt after marriage, and consequently there was no debt contracted before marriage. As has been pointed out, the effect of that is to make the section read as if it were "shall have any validity against judgment debts contracted by her before marriage." The section does not say so, and it

appears to have been framed in the widest terms to apply to all debts before marriage: When you try to enforce the debt you shall get a judgment, and if the getting of a judgment after marriage was to destroy the effect of this section, it might as well not have been enacted at all, and for these reasons I should have been disposed, if that were the only matter in the case, to disagree with the view of the learned judge. But it appears to me when one looks more carefully into the facts of the case that there are very great difficulties in the way of granting a receiver at all. Debts contracted by a married woman before marriage cannot in any view include interest which becomes due after marriage on a principal debt contracted before marriage. Interest in such a case is a debt contracted after marriage. The consequence of that is that the restriction against anticipation would be valid as to such part of the judgment debt as represented interest accrued after marriage. But I am not aware of any authority for splitting up a judgment debt which on the face of it is for one sum, and saying that part of it can be traced for a particular cause, and another part of it for another cause, and that as to the first part execution on the judgment may be given in one way, and as to the second part execution shall be restricted to another way. *Forster* v. *Baker* (1), to which my Lord has already referred, appears definitely to be against the idea that a judgment may be split up, and various remedies in respect of different parts of it given to various assignees.

Now, as the Court ought only to grant receivers where it is just and convenient to do so, it appears to me that the fact that it is asked to grant a receiver of part of a judgment debt, which is to be extracted by some calculation from the one sum mentioned in the judgment, is a very good and sufficient reason for refusing to grant a receiver in this case. It may be that the result is that the unfortunate appellant will find considerable difficulty in getting his money, but when he deals with ladies no doubt he is often in that difficulty, but the Court cannot for that reason alter the principle upon

(1) [1910] 2 K. B. 636.

C. A. 1920

ROTHSCHILD v. FISHER.

Scrutton L.J.

which it proceeds in dealing with such matters. I therefore agree with my Lord that the appeal fails for the reasons stated and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Routh, Stacey & Castle, for G. Colbourne, Brighton.*

Solicitors for respondent: *Lazarus & Son.*

W. I. C.

1920

March 9.

REDMOND *v.* DAINTON.

[1919. R. 553.]

Landlord and Tenant—Lease—Covenant to repair—Dwelling-house—Bomb from Enemy Aeroplane—Damage—Liability of Lessee.

A lease of a dwelling-house contained a covenant by the lessee at all times during the term substantially to repair, uphold, support, sustain, and maintain the dwelling-house. During the currency of the lease the house was struck by a bomb discharged from an enemy aeroplane, and was damaged:—

Held, that the lessee was liable to repair the damage.

Paradine v. *Jane* (1647) Aleyn, 26 followed.

ACTION tried by Darling J. without a jury.

The plaintiff claimed, (1.) possession of a dwelling house and premises, No. 175, Belsize Road, Hampstead, upon a forfeiture for breach of a covenant to repair, (2.) damages for breach of covenant, and (3.) mesne profits.

By an indenture of lease dated May 1, 1867, the premises were demised by the plaintiff's predecessor in title to one Dale for a term of ninety-nine years from Christmas, 1855, at the yearly rent of 8*l.* 8*s.* The defendant was the assignee of the term and was in possession of the premises. The lease contained the following covenants by the lessee, his executors administrators or assigns: To keep the dwelling-house insured against fire during the term, and to expend

upon the demised premises all money received from the insurance in rebuilding restoring or reinstating the premises; at all times during the term sufficiently and substantially to repair, uphold, support, sustain, and maintain the dwelling-house, walls and premises, and every part thereof; and at the end or other sooner determination of the term to surrender and yield up the premises being well and sufficiently repaired etc. as aforesaid.

On January 28, 1918, the house was struck by a bomb discharged from a German aeroplane, and was very seriously damaged. With the exception of some repairs to the party wall between the house and an adjoining one, no repairs were done to the house by the defendant after January 28, 1918 and on January 27, 1919, the plaintiff served the defendant with a notice under s. 14 of the Conveyancing Act, 1881, specifying breaches of the covenant to repair and requiring the defendant to remedy them. The defendant did not comply with the notice and the plaintiff on May 29, 1919, issued the writ in this action.

H. C. Davenport for the plaintiff cited *Clark* v. *Glasgow Assurance Co.* (1)

H. J. H. Mackay for the defendant. The work which the defendant was required to do by the notice served under the Conveyancing Act, 1881, is practically the rebuilding of the whole house. By the terms of the lease the defendant is by express covenant bound to rebuild if the house is destroyed by fire, and by implication he is not liable to rebuild if it is destroyed by any other cause. Further, the defendant is not liable under the repairing covenant as the damage was done by the King's enemies: *Paradine* v. *Jane.* (2)

DARLING J. [after stating the facts, said:] It has been contended on behalf of the defendant that because there is an express covenant to rebuild the premises in one event, that is, if they should be destroyed by fire, there is no implied covenant to rebuild them if they are destroyed in any other

(1) (1854) 1 Macq. 668. (2) Aleyn, 26.

1920

REDMOND v. DAINTON.

Darling J.

manner. It is not necessary to consider whether that contention is well founded, because there is in this lease a covenant which requires the defendant to do everything which the plaintiff alleges he should have done, that is, the covenant to repair uphold and maintain the dwelling-house and premises and any part thereof. The fact that the lease contains a covenant to rebuild the premises in the event of their destruction by fire does not absolve the defendant from his liability to perform the repairing covenant even although it necessitates the work of rebuilding. There is ample authority to support that view. Then it was argued that the defendant is not bound to make good damage which has resulted, not from a fire, but from an act of the King's enemies, and *Paradine* v. *Jane* (1) was cited in support of that contention. It appears to me that, so far from *Paradine* v. *Jane* (1) helping the defendant, it is a distinct authority against him, for in that case, "it was resolved that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. . . . . But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract,' so that it is no excuse if that which happens might have been provided against by the contract. The report goes on: "And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." As I have said, *Paradine* v. *Jane* (1) appears to me to be a distinct authority against the defendant. No case has been cited to show that where a lease contains a covenant to keep a building in repair, the lessee is not liable under the covenant if the

(1) Aleyn, 26, 27.

building is damaged by lightning or the King's enemies, and the reason given in *Paradine* v. *Jane* (1) is that those are matters which could have been provided against by an express proviso; and in the absence of any such proviso the lessee is bound by a repairing covenant such as this lease contains to reinstate the premises if they are destroyed by a bomb discharged from an aeroplane by an enemy of the King. The present case is not in fact a case of rebuilding but of reparation only, for the bomb did not entirely destroy the house, and a considerable part of it is still standing, and something like this point appears in *Paradine* v. *Jane* (1) for it was there said: "Rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations."

I hold, therefore, that there has been a breach of the covenant to repair, and there will be judgment for the plaintiff for possession and mesne profits, which have been agreed, and for damages which I assess at 400*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Eland, Nettleship & Butt.*
Solicitors for defendant: *Sydney Smith, Son & Leefe.*

F. O. R.

(1) Aleyn, 26, 27.

1920

March 8, 17.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* EMILY DYMOND.

Criminal Law—Demanding Money with Menaces—Reasonable or probable Cause—Honest Belief—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 29, *sub-s.* 1 (i.).

It is no defence to an indictment charging the prisoner with uttering, knowing the contents thereof, a letter demanding of the prosecutor money with menaces, and without any reasonable or probable cause, contrary to s. 29, sub-s. 1 (i.), of the Larceny Act, 1916, that the prisoner honestly believed that she had a reasonable or probable cause for making the demand.

The direction of Tindal C.J. to the jury in *Reg.* v. *Miard* (1844) 1 Cox C. C. 22 ought not to be followed.

APPEAL against conviction.

The appellant was indicted at the Devonshire Assizes held before Darling J. for that she on December 29, 1919, did feloniously utter, knowing the contents thereof, a letter or writing, demanding certain property or valuable thing of one A. B. with menaces and without any reasonable or probable cause. (1) The appellant pleaded not guilty.

Evidence was given by the prosecutor that a letter in the following terms addressed to him was handed to him by the appellant: "I am sending you a notice I am going to Summons you for insulting Saturday night, 27 Dec., out reck park, for putting your hand in under my Clothes. I going summons you for trying to take upper hand of me. What do you call yourself, a gentleman or no. I don't think that you are a gentleman for insulting me like you did. I will make you pay Dear enough for this. You call yourself the Mayor of the town. If you don't send Apologize to me

(1) Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 29, sub-s. 1: "Every person who:—

(i.) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing;

. . . . . .

shall be guilty of felony, and on conviction thereof liable to penal servitude for life, ..."

I shall see further into to-night. I always pass you, and give you the time off the day in a reasonable manner. I leave this to you to think what you are going to do, paid or gett summons; you can please yourself what to do. I expect a message this afternoon, you can send over a message by your boy over to the factory. Mrs. Rudd to me what you are going to do. You can't deny that you dind to not ask me. I have not give any encouraged whatever if you don't send to and apologize I shall let everybody knowed in the town it—From EMILY DYMOND.

"If you like to paid for this I won't say anything, but if you don't I shall. I am not a hore for anybody. I will soon let the town knowed all about your going on. you woundt like going up town hall to be cry down. I shall summons if it cost ten pound you got the money you will have to paid it you can send a message to me by four o'clock, then I can do what I want after I leave work. I like you men ought to be talk up a bit if I don't fine any answer this afternoon I shall see further into it."

After the prosecutor had given his evidence in chief counsel for the appellant informed the judge that the defence intended to be put forward was that the appellant had been indecently assaulted by the prosecutor and that in these circumstances she honestly believed that she had reasonable and probable cause for writing the letter; and counsel asked for the ruling of the judge, on the authority of *Reg.* v. *Miard* (1), that he was entitled to cross-examine the prosecutor, and also to call evidence for the defence, in order to elicit facts relevant to this defence.

Darling J. held that proof of the fact that the appellant believed that she had reasonable and probable cause for writing the letter would not amount to a defence to the indictment, and stated that he should disallow the questions which counsel desired to put to the prosecutor in cross-examination. The prosecutor was, therefore, not cross-examined, and no witnesses were called for the defence.

(1) 1 Cox C. C. 22.

C. C. A. 1920

REX v. DYMOND.

The appellant was convicted, and Darling J. certified that the case was a fit case for an appeal. Sentence was postponed, pending the hearing of the appeal.

Dummett for the appellant. The ruling of the learned judge that the prosecutor could not be cross-examined with a view to proving the truth of the accusation in the letter, and that evidence could not be called for that purpose, was not in accordance with the authorities. If it was true that the prosecutor had indecently assaulted the appellant, and if she honestly believed that in the circumstances she was entitled to demand money from the prosecutor as compensation for the wrong which he had done her, there was reasonable and probable cause for making the demand, and the appellant was entitled to be acquitted. In *Reg.* v. *Miard* (1) Tindal C.J. directed the jury that the question was whether the "demand was made at a time when the party making it really and honestly believed that she had good and probable cause for so doing." *Reg.* v. *Miard* (1) was cited to the Court, and was not disapproved of, in *Reg.* v. *Chalmers* (2), and in *Reg.* v. *Cracknell* (3) cross-examination of the prosecutor as to the truth of the charge imputed to him was permitted. In *Reg.* v. *Hamilton* (4) it was held that the words "without any reasonable or probable cause" apply to the money demanded and not to the accusation made. In the case of a common assault the person assaulted may take either civil or criminal proceedings, and it may well be the case that the victim of an indecent assault may honestly believe that she is entitled, as an alternative to prosecution, to demand pecuniary compensation. It is for the prosecution to negative the existence of reasonable or probable cause: *Hicks* v. *Faulkner* (5); and it is a question of fact involving the consideration of the state of mind of the accused person. It is essential therefore that every fact material to the question of the prisoner's state of mind should be before the jury.

(1) 1 Cox C. C. 22, 24.
(2) (1867) 10 Cox C. C. 450.
(3) (1866) 10 Cox C. C. 408.
(4) (1843) 1 C. & K. 212.
(5) (1878) 8 Q. B. D. 167.

Sir Richard Muir (*W. T. Snell* with him) for the Crown. If a prosecutor is a witness to a material fact, as, for example, that he received the threatening letter or that the accused person wrote it, and if the defence intends to challenge his evidence as to that fact, he can be cross-examined to credit, even to the extent of asking him whether he did not in fact commit the offence imputed to him, but in cases under clauses (ii.) and (iii.) of s. 29, sub-s. 1 (which do not contain the words "without any reasonable or probable cause"), the defendant would be bound by his answer. In cases under clause (i.) the position is this. If it is a matter of civil right between the prosecutor and the prisoner questions may be put in cross-examination, and evidence may be called, to prove that the charge made against the prosecutor is in fact true. But if the matter is one which affects the State and the administration of the criminal law the cross-examination and the evidence ought to be excluded. In cases of assault it is only where it is a common assault that the party can elect whether to proceed by a civil action or by a criminal prosecution. There is no right of election in the case of an indecent assault, which is an offence against the State, and an indecent assault cannot be the foundation of a defence of reasonable or probable cause for the demand of money, and, a fortiori, the mistaken belief of the accused person cannot be a defence to a charge under clause (i.)

The word "reasonable" means just, fair and equitable, and the Act cannot mean that it is reasonable in that sense for a woman who alleges that she has been indecently assaulted to demand money rather than to prosecute, which would in effect be the granting of a licence to blackmail. [*Reg.* v. *Richards* (1) was referred to.]

Cur. adv. vult.

March 17. The judgment of the Court (Earl of Reading C.J., Shearman and Sankey JJ.) was read by

EARL OF READING C.J. The appellant was convicted on an indictment under s. 29, sub-s. 1 (i.), of the Larceny Act,

(1) (1868) 11 Cox C. C. 43.

C. C. A. 1920

REX v. DYMOND.

Earl of Reading C.J.

1916, charging her with uttering, knowing the contents thereof, a letter to A. B. with menaces and without any reasonable or probable cause. Sentence was postponed by Darling J. pending the hearing of the appeal to this Court upon the certificate of the learned judge, and the accused was released on bail on her own recognisances to surrender herself to receive judgment if called upon.

After the case had been opened and the prosecutor had given his evidence in chief, counsel for the accused indicated the defence he intended to put forward and invited the learned judge's ruling as to the materiality and regularity of a cross-examination which he proposed to administer to the prosecutor for the purpose of eliciting facts relevant to the issue which he intended to raise as a defence. He contended that if he could establish that she believed she had reasonable or probable cause for writing the threatening letter she would be entitled to an acquittal upon the authority of Tindal C.J. in *Reg.* v. *Miard.* (1) After argument Darling J. came to the conclusion that if the accused did establish that she believed she had reasonable or probable cause for making the demand it would be no defence unless she could establish that she had in fact reasonable or probable cause for making it. Counsel then intimated that he could take no further part in the trial as, although he made no admissions, he was not instructed to put forward any defence other than that indicated by him upon which the learned judge had ruled against him.

The question before this Court depends upon our view of the words of the statute which are: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, property or valuable thing shall be guilty of felony": see s. 29, sub-s. 1 (i.), of the Larceny Act, 1916. In substance the language used in this consolidating statute is a re-enactment of the offence constituted by 7 & 8 Geo. 4, c. 29, s. 8. In *Reg.* v. *Hamilton* (2) it was decided by Rolfe B. that the words "without any

(1) 1 Cox C. C. 22. (2) 1 C. & K. 212.

reasonable or probable cause" in 7 & 8 Geo. 4, c. 29, s. 8, applied to the money demanded and not to the accusation constituting the threat. The decision in *Reg.* v. *Chalmers* (1) is to the same effect. In that case Kelly C.B. left it to the jury to determine whether there was any reasonable or probable cause for demanding the money. In the argument in that case before the Court of Criminal Appeal reference was made to *Reg.* v. *Miard* (2), and it was contended that the question whether the accused honestly believed that she had reasonable ground for making the demand should have been left to the jury, but the Court being of opinion that there was no circumstance proved upon which any just demand or belief in such demand could have been founded affirmed the conviction without expressing any opinion on the decision of Tindal C.J.

In our judgment the question must be determined solely by reference to the language of the statute. The words are "without any reasonable or probable cause" and nothing in the original statute or in the consolidating statute suggests that an honest belief by the accused in a reasonable or probable cause for the demand would negative the crime. In order to constitute the offence it must be proved that the accused: (1.) uttered the writing; (2.) demanded property or a valuable thing with menaces; (3.) knew the contents of the writing; and (4.) had no reasonable or probable cause for making the demand. It is for the jury to decide whether there was reasonable or probable cause for making the demand and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it. The belief of the accused may, of course, be taken into consideration by the judge in passing sentence, but in our view it is not material in ascertaining whether the crime has been committed. We do not think that the direction in *Reg.* v. *Miard* (2), which was given at assizes on the facts of a peculiar case, and introduces words not found in the statute, is one which has been, or should be, followed. It is interesting to observe

(1) 10 Cox C. C. 450. (2) 1 Cox C. C. 22.

C. C. A. 1920

REX v. DYMOND.

Earl of Reading C.J.

that in *Rex* v. *Craig* (1), a decision of the Supreme Court of Victoria, the judges held that *Reg.* v. *Miard* (2) should not be followed, as it did not leave the question to the jury in the words of the section.

Nothing that we have said in the present case is intended to cover more than that which is strictly necessary for the decision of this case. It is undesirable to deal with hypothetical cases which are not before us. It must be remembered that the decision of the learned judge was given after a statement by counsel as to the question he wished to raise, and was not a ruling that counsel could not put specific questions or that specific evidence tendered should be rejected. It was merely a decision that the belief by the accused that she had reasonable or probable cause for making the demand of money by proving that she believed the prosecutor had committed an indecent assault upon her would not entitle her to an acquittal.

The result of our decision is that the appeal is dismissed and the appellant must surrender at the next assizes for sentence.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

F. O. R.

(1) (1903) 29 Viet. L. R. 28. (2) 1 Cox C. C. 22.

SEDGWICK *v.* BOURNE.

1920

March 18, 19.

Ecclesiastical Law—Parish Church—Substitution of New Church—Provision of Endowment—Consecration—Validity—Subsequent Transfer of Endowments of old Church—Jurisdiction of Bishop—Church Building Act, 1845 (8 & 9 *Vict.*, *c.* 70), *s.* 1—*Council of London*, 1102, *Sixteenth Canon.*

In 1891 a church was built in a parish to take the place of the existing parish church which had become inadequate for the performance of Divine worship. By a sentence and decree of the Bishop of the diocese, dated November 12, 1891, the new church was declared to be duly consecrated; and by an instrument dated December 10, 1891, and made under s. 1 of the Church Building Act, 1845, the Ecclesiastical Commissioners declared that the new church should thenceforth be the parish church in the place of the old parish church and transferred the endowments of the old parish church to the new parish church. In 1905 the plaintiff became the rector of the parish and was "read in" in the new church. The plaintiff applied in the County Court under the Tithe Act, 1891, for an order for the payment of tithe rentcharge by the defendant, the owner and occupier of land in the parish. The defendant contended that the new church had not been validly consecrated in that the requirements of the Sixteenth Canon of the Council of London of 1102 as to the provision of endowment before consecration had not been complied with, and that the plaintiff was, therefore, not the lawful incumbent of the parish and was not entitled to the tithe rentcharge:—

Held, that, assuming the requirements of the Sixteenth Canon had not been complied with, the decree of consecration had been issued by the Bishop acting within his jurisdiction and its validity could not be questioned in these proceedings, and that the plaintiff was entitled to the order for payment of tithe rentcharge by the defendant.

Held, further, that the church had been validly consecrated.

APPEAL from the County Court of Hampshire holden at Winchester.

The plaintiff, the Rev. S. N. Sedgwick, applied in the County Court under the Tithe Act, 1891, for an order for the recovery of 3*l.* 14*s.* 5*d.* due in respect of the tithe rentcharge issuing out of certain lands in the parish of Bishopstoke, Hants, of which lands the defendant Bourne was the owner and occupier. The defendant opposed the application on the ground that the plaintiff was not the lawful incumbent of the parish and was, therefore, not the owner of the tithe rentcharge.

1920

SEDGWICK v. BOURNE.

The material facts, which were not in dispute, were as follows:—In 1891 the parish church of Bishopstoke was in bad repair and inadequate for the performance of Divine worship. A new church was erected on a piece of land given by the owner for that purpose, and steps were taken with a view to the new church becoming the parish church in lieu of the old one. By a sentence and decree of the Bishop of Guildford dated November 12, 1891, the new church was declared to be duly consecrated by the name of the Church of St. Mary, Bishopstoke, and to be deemed and taken as and for the parish church of Bishopstoke. By an instrument dated December 10, 1891, the Ecclesiastical Commissioners, in execution of the powers contained in 8 & 9 Vict. c. 70 (1) and 19 & 20 Vict. c. 55, after reciting that it had been duly certified that it would be for the convenience of the parish of Bishopstoke that the new church should be substituted for the old parish church, declared that the new church, duly consecrated as aforesaid, should be and the same was thereby substituted for the old parish church and that the new church should thenceforth be the parish church of Bishop-

(1) Church Building Act, 1845 (8 & 9 Vict. c. 70), s. 1: "Notwithstanding any limitation or restriction or other thing contained in" 3 Geo. 4, c. 72, "where a new church has been already built or shall hereafter be built in any parish . . . . and where the bishop of the diocese and the patron and incumbent of such parish . . . . . shall at any time certify to Her Majesty's commissioners for building new churches that it will be for the convenience of such parish . . . . that such new church, being duly consecrated, should be substituted for the old or existing church situate therein, it shall be lawful for the said commissioners by an instrument under their common seal, with the consents of such bishop, patron, and incumbent, under their hands and seals, to declare that such new church, being duly consecrated, shall be substituted for such old or existing church, and to transfer the endowments, emoluments, or rights belonging to such old or existing church, or to the incumbent or minister thereof, to such new church, and to the incumbent or minister thereof, and his successors; and it shall be lawful in every such case for the trustees (if any) of such old or existing church, or of any rights, emoluments, or endowments belonging thereto, or to the incumbent or minister thereof, and they are hereby required, and indemnified for so doing, to transfer the same according to the direction of the said commissioners; and immediately from and after such transfer all glebe lands, tithes, and other endowments, emoluments, fees, and profits, and every matter or thing, whether real or personal, and all rights and privileges, wherewith

stoke in lieu of the old parish church. By the same instrument the Ecclesiastical Commissioners transferred all the endowments, emoluments and rights of or belonging to the old parish church or the rector thereof to the new parish church and to the rector thereof and his successors for ever.

In 1905 the applicant was presented to the living of Bishopstoke. His induction and "reading-in" took place at the new church.

The contention of the defendant in opposition to the application was that the consecration of the new church was invalid by reason of the fact that the transfer of the endowments of the old church to the new had followed the consecration, instead of preceding it as required by the Canon Law. (1)

The County Court judge held that, assuming that the validity of the consecration could be questioned on these proceedings, and assuming further that in the circumstances the consecration was by Canon Law irregular, the tithe rentcharge attached to the benefice vested in the plaintiff on his induction by virtue of 8 & 9 Vict. c. 70, and the instrument of December 10, 1891. The County Court judge made the order claimed by the plaintiff.

The defendant appealed.

any such old or existing church is, or was at the time of such substitution, endowed, or to which the incumbent or minister thereof was or is entitled, shall be vested in and belong to the incumbent or minister for the time being of such new church, and his successors, in as ample a manner as the incumbent or minister of the old or existing church might have enjoyed the same if such transfer had not taken place, and the incumbent or minister of such old or existing church shall thereupon be, to all intents and purposes the rector, vicar, perpetual curate, or minister, as the case may be, of such new church, instead of rector, vicar, perpetual curate, or minister of such old or existing church, without any presentation, institution, induction, collation, or other form of law being had, observed, or required; and such new church shall thereupon have the same rights and privileges as such old or existing church, and such offices of the church as were performed and celebrated in such old or existing church shall be performed and celebrated in such new church, and such new church shall be to all intents and purposes in lieu of the old or existing church; . . . ."

(1) The Sixteenth Canon of the Council of London, 1102, provides: "Ne ecclesia sacretur donec provideantur necessaria et presbytero et ecclesiae."

1920

SEDGWICK v. BOURNE.

Emanuel K.C. and *Trapnell* for the appellant. The plaintiff is not the lawful incumbent of the new church because there has been no valid consecration of that church, and, therefore, he is not entitled to the tithe rentcharge. The instrument under the seal of the Ecclesiastical Commissioners dated December 10, 1891, purporting to substitute the new church for the old parish church, and to transfer all the endowments and emoluments of the old parish church to the new church was void and never came into force, because the new church had never been duly consecrated. The Church Building Act, 1845, under which the instrument was made, expressly provides that it shall be lawful for the Commissioners to declare that the "new church, being duly consecrated, should be substituted for the old or existing church" and to transfer the endowments. The tithe rentcharge is part of the endowment of the old church, and it can only be claimed by the incumbent of the parish church. The induction of the plaintiff into the new church did not in the circumstances cause him to be entitled to the tithes of the parish. The person who was incumbent at the time the new church was built continued to receive the tithe in virtue of his being the incumbent of the old parish church, but the plaintiff not having been inducted into the old church never became entitled to the emoluments which his predecessor had received. The provisions of the statute must be strictly complied with. There must be a new church in a state of consecration before it can be substituted for an existing parish church and before the endowments of the existing church can be transferred to the new church. When a new church is erected it cannot be consecrated without a competent endowment. That has been the law of the Church of England since the Council of London in 1102.

[YOUNGER L.J. If that is so the result would be that a church substituted for a parish church would have to be doubly endowed.]

An existing church may be rebuilt under the powers conferred by 59 Geo. 3, c. 134, s. 40, in which case that difficulty would not arise. But that statute was not put into operation

in the present case because of the difficulty in obtaining the necessary consents. The ecclesiastical law of England is part of the general law of England and includes such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm. In determining what is the English ecclesiastical law great weight should be given to the principles of the ecclesiastical law laid down by those ancient writers on the ecclesiastical law of England whose treatises have been accepted by the judges in the Ecclesiastical Courts as of authority. [See *Mackonochie* v. *Lord Penzance* (1); *Kemp* v. *Wickes*. (2)] The ancient canons dealing with the consecrating of churches are stated in Gibson's Codex Juris Ecclesiastici Anglicani, vol. i., tit. ix., c. 1, published in 1713, as follows: "After a new church is erected it may not be consecrated, without a competent endowment: so saith the fifth canon of the Council of Bracara, Unus quisque episcoporum meminerit, ut non prius dedicet ecclesiam, nisi antea dotem basilicæ et obsequium ipsius, per donationem chartulæ confirmatum, accipiat. And, here at home, to the same purpose, is the Sixteenth Canon made in the Council of London: Ne ecclesia sacretur, donec provideantur necessaria et presbytero et ecclesiæ. And the Canon law goes further, requiring the endowment, not only to be made before consecration (cum non sit ecclesia, nisi de dote provisum ei fuerit, consecranda, etc.), but even to be ascertained and exhibited, before they begin to build: Nemo ecclesiam ædificet, antequam præfiniat, qui ædificare vult, quæ ad luminaria, et ad custodiam, et ad stipendia custodum sufficiant, et ostensa donatione sic domum ædificet. And the civil law is yet more strict, enjoining that the endowment be actually made, before the building be begun, Faciat prius donationem eorum, quæ futura sunt deputari, et ita domus ædificetur." That passage is cited in Burns' Ecclesiastical Law, 9th ed., vol. i., p. 324, as being still the law. A bishop would not be entitled to consecrate a new church notwithstanding that he was informed that ample provision had been made for the stipend of the priest.

(1) (1881) 6 App. Cas. 424, 446. (2) (1809) 3 Phillim. 264, 276.

1920

SEDGWICK v. BOURNE.

[ATKIN L.J. At the time of the consecration provision had been made for the priest because he was already in receipt of the emoluments of the old church. After the consecration of the new church the emoluments and endowments of the old church were transferred to the new church. Why was not that sufficient ?]

[YOUNGER L.J. The meaning of "providere" according to the dictionary is "to see in the distance" and not "to provide."]

In the form of consecration which is now generally used and which is set out in Burns' Ecclesiastical Law, 9th ed., vol. i., p. 327, it is stated that "the endowment, and the evidences thereof, are to be laid before the bishop, or his chancellor, some time before the day appointed, in order to the preparing of the act or sentence of consecration against that day." At the consecration "the bishop, sitting in the chair, is to have the instrument or instruments of donation and endowment presented to him by the founder, or some proper substitute; which he lays upon the communion table." This has to take place before the sentence of consecration is read by the chancellor and signed by the bishop. A promise of endowment is not sufficient; there must be an actual endowment before the church can be consecrated. It cannot be said that an endowment is in sight merely because it is intended to substitute a new church for an old one which has an endowment inasmuch as that would depend on the consent of three persons. The law of England only recognizes the consecration of a church as valid when it is properly endowed and not merely when there is a chance of it being endowed. A building can be consecrated as a chapel without any necessaria being provided but not as a church. Only a church, however, can be substituted for an old parish church.

du Parcq (*Charles K.C.* with him) for the respondent. Assuming that the contention of the appellant as to the meaning of the Sixteenth Canon is right, and that the duty of a Bishop is not to consecrate a church unless and until he has satisfied himself that an adequate endowment has been secured, there is no authority for saying that if the Bishop neglects that duty

1920

SEDGWICK v. BOURNE.

the consecration of the church is invalid. Consecration is effected by the decree of a competent Ecclesiastical Court; that is, the act or sentence of consecration signed by the Bishop setting aside the building in sacros usus, and so long as that decree stands, this Court has no power to declare the consecration to be invalid: *Wood* v. *Headingley-cum-Burley Burial Board*, per Lord Coleridge C.J. (1)

Further, in the circumstances of this case, the Bishop was entitled, in the exercise of his discretion, to form the opinion that the endowment of the new church was amply provided for. The matter was one for him to decide, and his decision cannot be questioned.

Emanuel K.C. replied.

ATKIN L.J. (2) (after stating the facts). The questions raised by this case are, first, whether the present rector of the parish of Bishopstoke is the lawful incumbent of that parish and, secondly, whether the church of St. Mary erected in 1891 is the parish church of that parish. It is contended that the respondent is not the lawful incumbent because he was not inducted into the lawful parish church; and it is said that the new church is not the lawful parish church because it was not legally substituted for the old parish church, on the ground that it could only be legally substituted after it had been duly consecrated and it could not be duly consecrated until it had been endowed. The controversy therefore is as to whether it was necessary in the circumstances that the new church should be endowed before consecration, and, if it was not, was the consecration lawful?

The alleged necessity for endowment before consecration is derived from the Sixteenth Canon of the Council of London of 1102 which is in these words: "Ne ecclesia sacretur donec provideantur necessaria et presbytero et ecclesiæ." It is not necessary in my view for the purpose of deciding this case to form a very certain opinion as to the meaning of Latin words used in 1102, but it does not appear to me that the canon

(1) [1892] 1 Q. B. 713, 725.

(2) Atkin and Younger L.JJ. were sitting as a Divisional Court of the King's Bench Division.

1920

SEDGWICK v. BOURNE.

Atkin L.J.

requires that the necessary endowment should be legally secured in advance. I think the right view is that the canon does not mean more than that the Bishop shall not consecrate a church unless he has had regard to and considered what provision has been made for the maintenance of the incumbent. It must be remembered that in the twelfth century it was not an easy thing to make an adequate legal assurance of property for religious purposes except by giving it out and out to the corporation which it was desired to benefit. I asked counsel how the provision was in fact made at that time, and it is common ground that the provision would take the form of the grant of a dwelling house for the incumbent and of a sufficient quantity of land, which we now know as glebe, for his support. If in the twelfth century it was necessary that, before the church could be consecrated, the Bishop must satisfy himself that a legal assurance of a sufficient quantity of land had been made, the question at once arises, to whom could the land be granted before the consecration of the church had taken place. I am assuming the case of the consecration of a parish church for the first time. I doubt whether there was any one to whom the grant could be made before the church had been consecrated. It could not be made to the rector because he could not be inducted until after the consecration and the grant could not be made to him until he was rector. It was suggested that there might be a grant to the use of some other person to hold the land until the rector should have been inducted, but I am not satisfied that the law of uses had advanced to that extent in the twelfth century, and there is no trace of any cases turning on of a grant of land for that purpose. In my opinion the Sixteenth Canon should be construed as meaning, not that there must be a legal assurance of maintenance for the incumbent before the church may be consecrated, but that the Bishop must satisfy himself that there will be future maintenance secured for him.

The next point is, supposing it is the duty of the Bishop, before consecration, to see that adequate maintenance has been secured, the Bishop himself must be the sole judge of

what is adequate maintenance. It is impossible to suppose that years or even centuries after a church had been consecrated it would be open to anyone to attack the consecration on the ground that the Bishop had exercised his discretion wrongly or had erred in thinking that adequate provision would be made for the maintenance of the incumbent after the consecration.

On the facts of the present case it appears to me that there was ample evidence on which the Bishop could come to the conclusion that the maintenance of the incumbent was amply secured. It was not a case where a new parish was about to be created with a new incumbent. The new church was built in the same parish as the old one for which it was intended to be substituted as the parish church, and the rector was to officiate in the new church in the same way as he had done in the old church. Inasmuch as it was evident that the rector in one form or another would continue to hold the tithe, and there was no ground for doubting that the Ecclesiastical Commissioners would make an order for substitution under the Church Building Act, 1845, the Bishop arrived reasonably at the conclusion that the maintenance of the incumbent of the new church was properly secured. In any case the Bishop's discretion in this matter cannot be challenged.

But I go further. I think that the effect of s. 1 of the Act of 1845 is to prevent this question from arising, for the section contemplates that the transfer of the endowments of the old church to the new one will follow the substitution of the new church as the parish church in the place of the old one, and therefore, if it be correct to say that a church cannot be consecrated unless it has previously been endowed, it would follow that where it was intended to substitute a new church for an old parish church, that intention could not be carried out unless the parish provides an entirely new endowment, although the old endowment which is going to be transferred is quite adequate. That would be a grotesque result and it cannot be what the statute contemplated. I put a question to counsel during the argument as to what would happen if there were a chapel of ease built in a parish and duly

1920

SEDGWICK v. BOURNE.

Atkin L.J.

consecrated, and it was desired to convert it into a parish church. We were told that in that case the Act would not apply and the conversion could not be carried out. I am unable to accept that view.

But there is yet another answer to the appellant's contention, which is quite apart from the question whether the Sixteenth Canon has been observed or not. The canon imposed an obligation on the Bishop, but the act of consecration is the exercise of a spiritual office; it is a decree of the Bishop setting apart a church for sacred and religious uses and for the purposes of Divine worship. It is impossible to suppose that the question of consecration can be affected in any way by a consideration of such topics as whether sufficient money has been raised for the support of the incumbent. The Bishop acting within his jurisdiction is to determine whether he will elect to exercise that jurisdiction. It may be that the canon lays down that he ought not to do so unless the canon has been complied with, and it may be that if nevertheless he does consecrate a church in a case in which the canon has not been complied with, an ecclesiastical offence is committed, but that has no bearing on the question whether the church has been validly consecrated. In performing the ceremony of consecration the Bishop was acting within his jurisdiction, even if the question of endowment was necessary to give him jurisdiction, and the validity of the consecration cannot be a question in this Court. But I ought to add that in my opinion no ground exists for saying that this church was not duly consecrated.

That really disposes of the appellant's contentions, but there is still another answer to them. If it be assumed that the securing of an adequate endowment is a condition precedent to the validity of the act of consecration, it appears to me that these elements were present in this case at the time of the consecration. When the church was consecrated it was not the parish church, for it did not become the parish church until after the decree of the Ecclesiastical Commissioners, but the person who was to perform the services in the new church before it should become the parish church

1920

SEDGWICK v. BOURNE.

Atkin L.J.

was the rector of the old church and he was in receipt of adequate maintenance. Therefore, at the time the Bishop consecrated the new church he did so for a person who was being adequately maintained by reason of his having been inducted into the old parish church. It is true that the new church was to become the new parish church, but at the time of the consecration the endowments of the old church were available for the maintenance of the rector of the new church.

I therefore come to the conclusion that in the circumstances the Bishop when he consecrated the new church acted within his authority according to the canon, and that the provisions of the Act have also been complied with. For these reasons the appeal fails and must be dismissed with costs. We have listened to a very interesting argument from counsel for the appellant, who cannot have found their task an agreeable one. It is, I think, to be regretted that this litigation should have been necessitated by the appellant raising this question as to the validity of the consecration of this church. I am satisfied that it was validly consecrated.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Joynson Hicks & Co.*

Solicitors for respondent: *Milles, Jennings & White, for Bailey, White & Nash, Winchester.*

F. O. R.

1920

[IN THE COURT OF APPEAL.]

March 23, 24.

CHAIRMAN, COUNCIL AND GOVERNORS OF BEDFORD COLLEGE *v.* GUEST (SURVEYOR OF TAXES).

Revenue—House Duty—College Buildings—Communication by covered Way—One Dwelling House—Question of Fact to be determined by Commissioners—Case stated—Construction—House Tax Act, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B, r.* 1.

The buildings of a college for the education of women provided accommodation for 597 persons, of whom 126 were resident, the remainder living at their own homes. The college buildings consisted of two blocks used exclusively by the residents for living and sleeping in, and another block used by the residents, for living and sleeping in, and also by the non-residents during the daytime, and four blocks, consisting of library, science buildings, lecture rooms and offices, which were used solely for educational purposes by residents and non-residents, no one living, eating, or sleeping in those blocks. These four blocks of buildings were not connected with the other blocks except by means of a substantial covered way one storey high, built of brick with a tiled roof, without any doors on either side, by means of which persons could pass from one block of buildings to another without going out of doors. This corridor was a convenience only, and its removal would in no way affect the use to which the several buildings were put. The college buildings were erected at the same time from the designs of the college architect. Rowlatt J. on a case stated by the Commissioners of income tax and in house duties held that the blocks of buildings together formed one dwelling house, and were assessable to inhabited house duty accordingly. On appeal:—

Held, that the question whether the whole of the buildings constituted one dwelling house assessable to inhabited house duty was one of fact to be determined by the Commissioners, and not one of law.

Held, also, on the case stated that there were sufficient facts upon which the Commissioners could find as a fact that the buildings constituted one dwelling house, and on construction that they had in fact done so, and therefore that the appeal failed.

Decision of Rowlatt J. [1919] 2 K. B. 231 affirmed on the facts.

APPEAL from a decision of Rowlatt J. (1) on a case stated by the Commissioners for executing the Acts relating to income tax and inhabited house duties for the parish and district of St. Marylebone.

(1) [1919] 2 K. B. 231.

The appellants appealed against the assessment to inhabited house duty made in respect of the college buildings in Regent's Park in the County of London for the year ending April 5, 1918, in the sum of 6500*l.* in the occupation of the appellants.

The facts as stated by the Commissioners were as follows :—

" 5. The appellants are a body incorporated by royal charter in 1909 under the name of ' The Chairman, Council and Governors of Bedford College.' The object of the college is (shortly) to provide a liberal education for women and to do all such things as are conducive thereto. We refer to a ground plan of the buildings and premises of the appellants in Regent's Park, which plan was before us on the hearing of the said appeal and is hereto annexed and made part of this case and marked with the letter ' A.'

" 6. The said buildings and premises consist of the lodge, in which the porter lives, and South Villa, the mansion house standing on the land when the appellants took their lease of the site from the Commissioners of His Majesty's Woods and Forests, and other portions marked Nos. 1 to 7 on the plan. No question arises as to the assessment of the lodge and South Villa and the portions 5, 6, 7, which it was agreed by the appellants are assessable to inhabited house duty.

" These portions numbered 1 to 7 on the plan are as follows :—

" 1. The Sir Henry Tate library consisting of one storey, marked 1 on the plan.

" 2. Science buildings, consisting of three storeys, marked 2 on the plan.

" 3. Lecture rooms and offices, consisting of three storeys, marked 3 on the plan.

" 4. Science buildings, consisting of three storeys, marked 4 on the plan.

" 5. The part marked 5 on the plan containing the dining-hall, kitchen, and common rooms, etc., with accommodation on the first floor over the kitchen for the servants' sleeping quarters, over the common rooms the principal's flat, and on the second floor over the principal's flat, residential rooms for a certain number of students.

C. A. 1920

BEDFORD COLLEGE v. GUEST.

" 6. A residential part, marked 6 on the plan.

" 7. Another residential part, marked 7 on the plan.

" 7. The several parts of the college buildings and premises marked 1 to 7 on the plan were erected at one and the same time from the designs of the college architect. The college buildings provide accommodation for 597 persons, of whom 126 students and staff are resident, living, eating and sleeping upon the college premises. The resident staff and students reside in 5, 6 and 7, and in South Villa. The non-resident students and staff live and sleep at their own homes, though many of them use the college dining hall in part 5. The whole of the residential accommodation was contained in parts 5, 6 and 7 on the plan, and in South Villa, no one—either caretaker or other person—living, eating or sleeping in 1, 2, 3 or 4. Only the resident students and staff have the right to use the portions marked 6 and 7 upon the plan. The portion marked 5 is used by the residents for living, eating and sleeping, and by non-residents during the daytime. The portions 1, 2, 3 and 4 were used for educational purposes solely, by both residents and non-residents. The portions marked 1, 2, 3 and 4 are not connected with the other portions 5, 6 and 7 save by means of a substantial covered way or corridor one storey high, and without any doors on either side, made of brick with a tiled roof and having windows at the sides, which enables the residents in parts 5, 6 and 7 to obtain access to the educational portions 1, 2, 3 and 4 and enables the non-resident students and staff to obtain access to the dining and common rooms without going into the open air. This way or corridor is a convenience only, and its removal would in no way affect the use to which the several portions are put. The boiler house, which is in portion 3, supplies the whole premises with hot water, and all gas and water pipes and electric cables are continuous throughout the whole premises.

" 8. The college premises are assessed to the parochial rates as a whole at the gross rateable value of 6500*l.* and 5417*l.* net rateable value.

" 9. The appellants contended that on the true construction of r. 2, Sched. B, of the House Tax Act, 1808, the portions

1, 2, 3 and 4 on the plan are not assessable to inhabited house duty as offices belonging to and occupied with the residential parts, and they contended that the assessment should be amended by the deduction therefrom of such portion of the said assessment as might be attributable to the value of the portions marked 1, 2, 3 and 4 upon the plan, together with a due proportion of the land occupied and used with all the college buildings.

"They submitted that the gross rateable value of the lodge, South Villa, and parts 5, 6 and 7 on the plan together with a due proportion of the land occupied and used with all the college buildings should be the sum of 3150*l.*, and that the gross rateable value of parts 1, 2, 3 and 4 on the plan together with a due proportion of the said land would, if the same were assessable—which they do not admit—be the sum of 3350*l.* The appellants relied on the decision of the House of Lords in *Westminster School* v. *Reith* (1). The respondent contended (inter alia) that having regard to the circumstances that all the premises in question stood within one curtilage and were in one occupation, and to the connection that existed between the several portions as above stated, the whole of such premises constituted one house and were properly assessable to inhabited house duty in one sum.

"10. We the said Commissioners were of opinion that on the above facts and seeing how the college buildings were constructed as above described we were bound in law to regard them as one house and assessable to inhabited house duty accordingly, and we therefore did dismiss the said appeal.

"11. The question upon which the decision of the Court is desired is whether we the said Commissioners upon the above statement of facts came to a correct decision in point of law, and, if not, what should be done in the premises."

Rowlatt J. held, that having regard to the manner in which the college buildings were constructed and the communication which existed between them, they must be regarded as one house within r. 1 of Sched. B to the House Tax

(1) [1915] A. C. 259.

C. A. 1920

BEDFORD COLLEGE v. GUEST.

Act, 1808, and therefore assessable to inhabited house duty accordingly.

The Governing Body of the college appealed.

Macmorran K.C. (*Naldrett* with him) for the appellants.

Sir Ernest Pollock S.-G., T. H. Parr and G. P. Hills for the respondent.

The arguments were substantially the same as those used in the Court below.

LORD STERNDALE M.R. I have some doubt about this matter in consequence of the form in which the case has been stated, but on the whole I have come to the conclusion that the appeal fails. It is an appeal by the Governing Body of Bedford College against the decision of Rowlatt J., affirming a decision of the Commissioners, by which the governing body of Bedford College were made liable to assessment to inhabited house duty upon the whole of their premises at Bedford College. The premises are shown upon the plan that was put before us. They consist of two buildings called the Lodge and South Villa as to which no question arises; they are detached from the rest of the college, and it is admitted that they are houses assessable to inhabited house duty. The rest of the college is the part in respect of which the question arises. [His Lordship described the blocks and the purposes for which they were used and read para. 7 of the case. He continued:] Now if the Commissioners had said: "Upon these facts we came to the conclusion that this was one dwelling house," I do not think any question could have arisen. It was obviously open to them upon these facts to find that this was one dwelling-house and not two, three or four, or whatever the number of the blocks might be. The difficulty I have in the case is to see whether they have so found. It is a question of fact. The mere fact of communication or non-communication does not determine the question; the mere fact of the building being of one design does not determine the question; the mere fact of the appearance of the premises and the way in which such things as hot-water pipes, electric light wires and gas pipes,

run through the whole, is not of itself conclusive. All these things must be considered together, and I do not think any objection could possibly have been taken if they had found that this was one house. Whether, upon the facts stated, a finding that it was not one house could have been supported I have some doubt, but it is not necessary to decide that point. As Rowlatt J. rightly says, and as was argued by the learned counsel for the appellants, a very slight alteration might make it into two houses. That however, as it seems to me, has nothing to do with the case before us; we have to deal with the college buildings as they are and not as they might be.

Then the difficulty arises from this, that the Commissioners have stated in para. 10: "We, the said Commissioners, were of opinion that on the above facts, and seeing how the college buildings were constructed as above described, we were bound in law to regard them as one house and assessable to inhabited house duty accordingly, and we therefore did dismiss the said appeal."

That puzzled me very much because it looked extraordinarily like stating what is really a question of fact as a question of law. Looking back again to the paragraphs which precede that paragraph I have come to the conclusion, though with some doubt, that that is not what the Commissioners intended to do. I think what they intended to do was this: to deal with an argument which I will read at greater length directly, that the case came within *Westminster School* v. *Reith* (1), in which it was held that the school buildings not connected with the college building in that case were not offices connected with it, and in which opinions were expressed, although the point was not raised in argument, that there being no connection between the school buildings and the college they were not one building. They referred to that case. They may have had the other case of *Browne* v. *Furtado* (2) called to their attention—I have little doubt they had—but they did not mention it in the case. They were dealing with that contention and they said, or I think they

(1) [1915] A. C. 259, 264. (2) [1903] 1 K. B. 273.

C. A. 1920

BEDFORD COLLEGE v. GUEST.

Lord Sterndale M.R.

intended to say : " We do not think that this case falls within *Westminster School* v. *Reith* (1), because in that case the buildings were not connected and it was not argued that they were one building. They say : " On the above facts, and seeing how the college buildings were constructed as above described, we were bound in law to regard them as one house and assessable to inhabited house duty."

I have come to the conclusion that that was what they meant, although it is very badly expressed, by reading para. 9 of the case, the paragraph immediately before the one I have already read. [His Lordship read the paragraph and continued :] I think what the Commissioners meant to say was this : " We reject that contention because 1, 2, 3 and 4 blocks are not separated from 5, 6 and 7 blocks in the way that the premises were separate in the case of the *Westminster School Case* (1), and therefore, rejecting that alternative on the facts and seeing how the college buildings are constructed, we must in law say that this is one house, assessable to inhabited house duty." That, although stated very clumsily, if I may say so without disrespect, as if it were a finding of law, was, I think, intended to be a question whether upon those facts that finding, which really was a finding of fact, was a good one at law. In my opinion it was, and therefore I think that the appeal fails.

I certainly think it could not possibly have succeeded upon the materials as they stand. The only alternative would have been to have sent the case back to the Commissioners to ask them to state their finding of fact more specifically and more clearly ; but on the whole I think that is the proper explanation of the way the case is stated, and that being so, I think that the appeal fails and must be dismissed with costs.

WARRINGTON L.J.—I am of the same opinion. In truth, the question whether the college buildings constitute one dwelling house for the purposes of the inhabited house duty is a question of fact and not of law. The difficulty in the present case is caused by the fact that the Commissioners have in form

(1) [1915] A. C. 259.

stated their finding as if it had been a finding in point of law. But I think that when that statement is compared with the statements immediately preceding as to the contentions of the several parties to the litigation it may really be expressed in this way: "Having regard to the facts which we have found there is no alternative for us except to say that the buildings in question are not separate from the residential part of the college; that is to say, they are not more than one house, and not separate houses." Having found that they are not more than one house, then the alternative follows and the buildings as a whole will be assessable in law to the inhabited house duty. In order to make that good, I must refer to the two findings in the case. I first take the finding which I say is in form a finding of law and not of fact. They say: "We, the Commissioners, were of opinion that on the above facts and seeing how the college buildings were constructed as above described, we were bound in law to regard them as one house, and assessable to inhabited house duty accordingly, and we therefore did dismiss the said appeal."

Now the paragraph immediately preceding that is the paragraph containing the submissions of the two sides. The college, who were the appellants, "submitted that the gross rateable value of the lodge, South Villa, and parts 5, 6 and 7 on the plan together with a due proportion of the land occupied and used with all the college buildings should be the sum of 3150*l.*, and that the gross rateable value of parts 1, 2, 3 and 4 on the plan together with a due proportion of the said land, would, if the same were assessable—which they do not admit—be the sum of 3,350*l.*" Then comes an important statement. "The appellants relied on the decision of the House of Lords in *Westminster School* v. *Reith*." (1)

The meaning of that must be this, that the appellants insisted that the two sets of buildings were separate buildings and therefore the decision of the House of Lords in the *Westminster School Case* (1) was applicable to the present case, and, if it was so applicable, then the appellants were entitled to succeed.

(1) [1915] A. C. 259.

C. A. 1920

BEDFORD COLLEGE v. GUEST.

Warrington L.J.

Then the Commissioners go on to state: "The respondent contended (inter alia) that having regard to the circumstances that all the premises in question stood within one curtilage and were in one occupation, and to the connection that existed between the several portions as above stated, the whole of such premises constituted one house and were properly assessable to inhabited house duty in one sum." That, put in other words, means that the respondents contended, against the view put forward by the appellants, that these were not separate houses but one house. Therefore, when in para. 10 the Commissioners say: "We the said Commissioners were of opinion that on the above facts . . . . we were bound in law to regard them as one house," I think they are really saying: "There is no evidence on which we could find that they were separate houses, and finding no evidence that they were separate houses, it follows then necessarily that they are one house, and therefore assessable to inhabited house duty." I think, put in that way, one may say that the real finding of the Commissioners is that they were not separate houses, and therefore were one house. The finding that they are not separate houses is really a finding of fact; there is upon the facts as found in the case no possible objection to it, and therefore on the whole I am of opinion that the appeal fails.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Shaen, Roscoe, Massey & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1920
Feb. 23.
March 2, 3, 26.

RALLI BROTHERS *v.* COMPAÑIA NAVIERA SOTA Y AZNAR.

Shipping—Charterparty—Freight—Foreign Law—Conflict of Laws—Mutual Inability of Charterers and Shipowners—Liability of Charterers.

An English firm in July, 1918, chartered a Spanish steamship from the owners, who were a Spanish firm, to carry a cargo of jute from Calcutta to Barcelona at a freight of 50*l.* per ton, one half to be paid to the owners in London on the vessel sailing from Calcutta and the balance to be paid at Barcelona by the receivers of the cargo, as to one half on arrival of the steamship and the remainder concurrently with the discharge. The freight payable at Barcelona was to be paid in cash or approved bills at charterers' option at the current rate of exchange for bankers' short bills on London. The charterparty, which was made in London, was in English and on the charterers' own form, and the charterers' liability to pay freight was thereby preserved. The charterparty also contained an arbitration clause under which disputes were to be decided by commercial men in London. The steamship sailed from Calcutta and half of the freight was duly paid. She arrived at Barcelona on December 28, 1918, and a sum of money was paid in sterling by the receivers of the cargo. By a decree of the Spanish Commission of Supplies, dated July 2, 1918, confirmed by a Royal Proclamation of September 14, 1918, the freight on jute was not to exceed 875 pesetas per ton. Owing to alterations in the rate of exchange the freight reserved by the charterparty was, at the date of the arrival of the steamship at Barcelona, largely in excess of 875 pesetas per ton. The receivers of the cargo atBarcelona tendered the balance of the freight at the rate of 875 pesetas per ton but refused to pay the balance of the freight reserved by the charterparty. The Spanish owners thereupon claimed to recover the balance of the freight from the charterers in England, notwithstanding that it exceeded the freight limited by Spanish law :—

Held, that the charterparty was an English contract to be construed according to English law, but that as that part of the contract dealing with the obligation of the charterers with regard to the payment of the balance of the freight had to be performed in Spain, and as by the law of Spain the payment of freight above 875 pesetas per ton was illegal, that part of the contract which required the payment of freight in excess of 875 pesetas per ton was invalid and could not be enforced against the charterers.

Ford v. *Cotesworth* (1870) L. R. 5 Q. B. 544 and *Cunningham* v. *Dunn* (1878) 3 C. P. D. 443 followed.

Jacobs v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589 considered.

Decision of Bailhache J. [1920] 1 K. B. 614 affirmed.

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

APPEAL by the shipowners from a decision of Bailhache J. (1) The facts are fully stated in the report of the case in the Court below and may be sufficiently gathered from the above headnote.

R. A. Wright K.C. and *Claughton Scott* for the shipowners.

Neilson K.C. and *Clement Davies* for the charterers.

The arguments were substantially the same as those used in the Court below. The following additional authorities were cited: *Shepard* v. *De Bernales* (2); *Scott* v. *Lord Ebury* (3); *Castle* v. *Playford* (4); *Ertel Bieber & Co.* v. *Rio Tinto Co.* (5); *Weir & Co.* v. *Girvin & Co.* (6); *Rouquette* v. *Overmann* (7); *Tapley* v. *Martens* (8); *Robinson* v. *Bland* (9); Scrutton on Charterparties, 9th ed., p. 212 n.(*h*); Dicey on Conflict of Laws, 2nd ed., pp. 553, 563, 564; Foote's Private International Jurisprudence, 4th ed., pp. 358, 367, 424.

March 26. LORD STERNDALE M.R. read the following judgment: This appeal from a judgment of Bailhache J. on an award stated by a commercial umpire, raises a difficult question as to the rights of the parties to a charterparty when the performance of the charter, or part of it, is prevented by the law of the country in which the performance was to take place.

The particular question in this case is as to the amount of freight payable by the charterers to the shipowners. The charter was one for the carriage of a cargo of jute from Calcutta to Spain; the clauses as to freight were as follow: Clause 1. "That the said steamer shall with all possible speed proceed under steam to Calcutta . . . . and shall there load, in the customary manner at any safe place always afloat, as ordered by charterers or their agents a full and complete cargo of jute, which the said charterers bind themselves to

(1) [1920] 1 K. B. 614.
(2) (1811) 13 East, 565.
(3) (1867) L. R. 2 C. P. 255.
(4) (1872) L. R. 7 Ex. 98.
(5) [1918] A. C. 260.
(6) [1900] 1 Q. B. 45.
(7) (1875) L. R. 10 Q. B. 525.
(8) (1800) 8 T. R. 451.
(9) (1760) 2 Burr. 1077.

ship, not exceeding what she can reasonably stow and carry over and above her tackle . . . . and being so loaded shall therewith proceed with all possible speed, under steam, via the Cape of Good Hope to Barcelona, Valencia, Alicante, Cadiz, Pasajes, or Bilbao as ordered on signing final bills of lading, or so near thereto as she may safely get, and there deliver the same, always afloat, on being paid freight at the rate of 50*l.* per ton of 5 bales of jute." Clause 18: "Cash at the port of loading, for the expenses of which charterers are to be in no way responsible, not exceeding 2500*l.* to be advanced the master, if required by him, at the current rate of exchange for three months' documentary bills. Said advance to be a first charge against the total freight earned, and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due under clause 30." Then clause 25 is: "The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo; by cash or approved bills (at charterers' option) at the current rate of exchange for bankers' short bills on London." And clause 30 is: "On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash without discount, one half of the total freight earned less any disbursements under clause 18. Such payment to be a first charge against the total freight earned and the master to so endorse on the bill of lading the amount advanced, which is to be deducted from freight due on the vessel's arrival at discharging port. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on the arrival of the vessel and the remainder concurrent with discharge." There was also an exception clause, containing amongst other exceptions, that of restraint of princes. There was no cessor clause, although clause 30 provided that the balance of freight was to be collected from the receivers of the cargo, the charterers still remained liable in case of non-payment by the receivers. The charter was on the charterers' usual form and was made in London between the charterers and a firm of Sotar & Aznar

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Lord Sterndale M.R.

by telegraphic authority and as agents for the owners, a Spanish company called the Compañia Naviera Sota y Aznar. I have no doubt that it was an English charter and governed by English law.

The umpire has found as a fact that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freights payable on jute imported into Spain at 875 pesetas per ton. It appears from the documents produced to us that persons infringing this decree made themselves liable to penalties, the result being, in my opinion, that it became illegal in Spain to pay or receive a higher freight than the maximum fixed by the decree. Messrs. Ralli Bros. had sold the cargo to a firm of Godo & Co. at a price not stated as "c.i.f.," but the invoice shows that the second half of the freight was to be paid as part of the contract price per ton. We have however nothing to do with the rights existing between the charterers and Godo & Co. When the vessel arrived the receivers tendered freight to the amount which they considered correct at the rate of 875 pesetas a ton, but the shipowners refused to deliver the cargo except upon payment of the charter rate of 50*l.* a ton. Certain litigation, which it is not necessary to discuss, took place in Spain, and eventually the rights of the shipowners and charterers upon the contract have to be decided upon the case stated by the umpire.

The most important question is as to the obligation imposed upon the charterers in respect of the payment of freight. It is contended by the shipowners that it is an absolute obligation to pay 50*l.* per ton, and that the subsequent clauses as to payment in Spain are only instructions not altering that obligation. They therefore contend that that part of the contract may be performed in England and that the charterers are therefore liable. I am not sure that, if this were the obligation, the contention would be right. The shipowners are a Spanish company and a debtor must seek his creditor and pay him in his own country. Sota & Aznar, the firm in London, are not the creditors, and have so signed

the charter as to prevent their having rights or liabilities under it.

But I do not think that this contention correctly states the charterers' obligation. I think the clauses as to place of payment constitute part of the obligation to pay, and are not merely instructions. The contract and obligation therefore are to pay on delivery in Spain in cash, that is, Spanish currency, or approved bills at the charterers' option. The simultaneous acts of delivery and payment are both to be performed in Spain, and the shipowners are a Spanish company. As I have shown, it was illegal in Spain to pay or receive more freight for imported jute than 875 pesetas a ton, and therefore the performance of the contract was illegal by the law of the place of its performance. In my opinion the law is correctly stated by Professor Dicey in his work on the Conflicts of Laws, 2nd ed., at p. 553, where he says: "A contract . . . . is, in general, invalid in so far as . . . . the performance of it is unlawful by the law of the country where the contract is to be performed. . . . . "

I think this is in accordance with the cases of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn*. (2) These cases have been criticised, notably in Carver on Carriage by Sea, § 129, but they are still authorities, and support the view which I have expressed. It was argued by the appellants that they are inconsistent with the cases of *Barker* v. *Hodgson* (3) and *Sjoerds* v. *Luscombe* (4), and that these last cases are the authorities applicable to this case. When those cases were decided the doctrine that a person who contracted absolutely to perform a contract must do so whatever the difficulties, as laid down in *Paradine* v. *Jane* (5), had not been qualified, as has been the case in later authorities. They may be reconciled with the later cases I have cited in the manner suggested in Scrutton on Charterparties, 9th ed., at p. 327; but, if there be a difference between them and *Ford* v.

(1) L. R. 5 Q. B. 544.
(2) 3 C. P. D. 443.
(3) (1814) 3 M. & S. 267, 270.
(4) (1812) 16 East, 201.
(5) (1647) Aleyn, 26.

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Lord Sterndale M.R.

Cotesworth (1) and *Cunningham* v. *Dunn* (2), I prefer to follow the later authorities.

The appellants also relied upon the case of *Jacobs* v. *Crédit Lyonnais* (3), and the headnote at first sight seems to bear out their contention. I do not however think the headnote is correct. The procuring or shipment of the cargo of esparto grass was not illegal, but, by reason of insurrection, and consequent Government prohibitions had become difficult and perhaps impossible. There was no clause in the contract applicable to such a state of things, but it would have amounted in French law to force majeure, and it was attempted to introduce that exception of force majeure into the contract because it had to be performed in France. That is not at all the question which is raised here. That case is examined and criticized by Professor Dicey in Conflict of Laws, 2nd ed., at p. 554.

I think on principle and on authority that the charterers are not bound to perform that part of the contract, that is, the payment of freight above the maximum allowed by Spanish law, which has become illegal by the law of the place of its performance. We have not before us, and I do not decide, any question as to what the result of this decision may be upon the rights of the parties as to delivery and disposal of the cargo. I do not think it necessary to express any opinion as to whether the exception of restraint of princes applies to the obligations of the charterers as well as to those of the shipowners.

In my opinion the decision of Bailhache J. was right, and the appeal must be dismissed with costs.

WARRINGTON L.J. read the following judgment: This is an appeal from an order of Bailhache J. on an award stated in the form of a special case by a commercial umpire in an arbitration between shipowners and charterers. The question in the arbitration was whether the owners could require the charterers to pay the full amount of the unpaid balance of the chartered freight or only such sum, if any, as together

(1) L. R. 5 Q. B. 544. (2) 3 C. P. D. 443.
(3) 12 Q. B. D. 589.

with the sums already paid would make up the maximum freight by Spanish law in force at the time the freight was payable, allowed to be paid or received in respect of a cargo of jute consigned, as the cargo in the present case was, to Spanish consignees at a Spanish port. Bailhache J. has on this question adopted the contention of the charterers that they cannot be called upon to pay any larger amount or freight than that allowed by the Spanish law. The owners appeal.

They contend that the contract is an English contract to be construed and to have effect according to English law; that according to its true construction it contains an absolute obligation on the part of the charterers to pay the freight fixed by the contract; and that although it contemplates the payment by the receivers of the cargo in Spain and it may be unlawful under Spanish law for them to pay it, this does not affect the obligation of the charterers.

The charterers on the other hand contend that though the contract as a whole is an English one the performance of it in the material respect was to take place in Spain; that the only obligation as to the balance of the freight was that it should be paid in Spain by the Spanish receivers of the cargo; that such an obligation ought to be held to be subject to an implied condition that such payment should not be illegal by Spanish law, and that if it is they cannot be required to pay.

The first question I think is what as regards payment of the freight is the true construction of the contract.

The contract is one of charterparty dated July 3, 1918, made between a Spanish company, owners of the steamship *Eretza Mendi*, and Messrs. Ralli Bros., an English firm carrying on business in London. It is partly written and partly printed, the form used being one of Messrs. Ralli Bros. ordinary forms with certain special variations. It contains an arbitration clause providing for an arbitration in London and for making the submission a rule of the High Court of Justice in England. It is clear I think that the parties are right in treating the contract as a whole as an English contract

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Warrington L.J.

The contract provides that the steamer, then at sea, is to proceed to Calcutta, there load a cargo of jute, which the charterers bind themselves to ship, and being so loaded is to proceed to Barcelona or another of certain named ports in Spain and there deliver the same on being paid freight at a specified rate per ton. There is no cessor clause as regards liability for freight. There are two clauses dealing with the payment of freight—clauses 25 and 30. Clause 25 is as follows: "The freight, except as provided for under clause 30, to be paid at port of discharge on the unloading and right delivery of the cargo by cash or approved bills (at charterers' option), at the current rate of exchange for bankers' short bills on London," and clause 30: "On receipt of telegraphic advice of steamer's sailing from Calcutta charterers undertake to pay in London to owners or their agents in cash without discount, one half of the total freight earned less any disbursements under clause 18. . . . . The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on the arrival of the vessel and the remainder concurrent with discharge."

The true effect of these provisions as regards payment of freight is I think this. There is no unqualified obligation on the part of the charterers to pay the freight; the introductory part of the contract contains no express obligation; "on being paid freight" which qualifies the owners' obligation to discharge the cargo means I think "on being paid in accordance with the provisions hereinafter contained." The express obligation on the charterers is found in clauses 25 and 30. We are not concerned with the first half. This was duly paid. The second half is to be paid by the receivers at the port of discharge in Spain and in Spanish money. The charterers in effect contract for the payment of the balance of the freight by Spaniards in Spain. I will consider the position of the charterers in the event of a failure on the part of the receivers, justified by Spanish law, to make the payment bargained for, after I have stated the remaining material facts.

The charter was entered into by Ralli Bros. for the purposes of a contract for sale of jute made by them with Godo & Co. of Barcelona. The ship arrived at Barcelona on December 28, 1918, and was ready then to discharge her cargo.

Questions then arose as to the amount of freight to be paid, Godo & Co. insisting that they could not be called upon to pay more than the legal rate fixed by Spanish law. There was then some litigation in the Spanish Courts into the particulars of which I do not propose to enter and this arbitration was commenced in London.

The umpire finds that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute at 875 pesetas per ton of 1000 kilogrammes. It appears by the translation of one of the documents annexed to the award that infractions of this decree render the infringer liable to legal penalties.

I think, therefore, that it is sufficiently made out that it would be illegal for a person subject to the law of Spain either to pay or to receive more than the maximum freight and such payment or receipt would render him liable to penalties.

There remains to be considered the legal position arising from the construction which, I think, ought to be placed on the contract and from the facts.

Professor Dicey at p. 553 of the 2nd ed. of his Conflict of Laws makes the following statement accepted by both parties in the present case as an accurate statement of the law. "A Contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1.) the performance of it is unlawful by the law of the country where the contract is to be performed, ..." and at p. 563 "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place." This last statement is, in substance, identical with a passage in the judgment of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1)

(1) [1891] 1 Q. B. 79, 83.

C.A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Warrington L.J.

In the present case I am of opinion that the contract is one the performance of which so far as the payment of the second half of the freight is concerned is to take place in Spain. It is true the obligation with which we are dealing is that of the charterers, but what they promise is that payment shall be made by Spaniards in Spain, and it is only in case of default by those who are to make the payment that their own liability arises. On the facts the default of these persons is justified by the law of Spain where the performance of such a contract is unlawful and the contract would be invalid.

Does this position affect the liability of the English charterers? I think it does. It must be remembered that not only is it illegal in Spain for the Spanish receivers to pay more than the legal rate of freight but it is unlawful for the owners who are also Spaniards to receive it. I think it must be held that it was an implied condition of the obligation of the charterers that the contemplated payment by Spaniards to Spaniards in Spain should not be illegal by the law of that country.

Had the performance of the contract so far as it was to be performed in England become illegal by English law performance would, in my opinion, have been excused, and on the ground that the contract was subject to an implied condition that its performance should not be illegal: see *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) and many other cases to which it is unnecessary to refer.

That a similar consequence will result from a joint inability of performance arising from illegality by foreign law where that law governs the performance appears, I think, from the decision in *Cunningham* v. *Dunn*. (2)

But it is said that there are authorities which lay down the proposition that if a man contracts absolutely to perform a certain act he is not excused by the fact that such an act is illegal by the law of the place where it is to be performed. A type of such cases is *Barker* v. *Hodgson*. (3) It was conceded by Lord Ellenborough in that case that had performance

(1) [1918] A. C. 119. (2) 3 C. P. D. 443.
(3) 3 M. & S. 267.

been rendered unlawful by the Government of this country both parties would have been excused, but he held that the same principle did not apply where the illegality arose from the law of a foreign country. I am not sure that this and similar cases would have been decided in the same way at the present time owing to the recent development of the law in reference to implied conditions, but however this may be it does not, in my opinion, govern the present case, in which, according to my view of the construction of the contract, there is no absolute obligation on the part of the charterers that they will themselves pay but only that payment shall be made in a particular way—namely, by foreigners at a foreign port.

It was contended that *Jacobs* v. *Crédit Lyonnais* (1) was an authority contrary to the view I have expressed. I think the criticism of Professor Dicey on the suggestion contained in the headnote to that case is well founded: see Conflict of Laws, 2nd ed., p. 554. The performance of the contract itself was not illegal by the foreign law. It was sought to be excused by saying that the collection of the subject-matter was prohibited, that such prohibition would by French law amount to "force majeure" and that "force majeure" would by that law be a good defence. It was this contention which was rejected by the Court.

On the whole I come to the conclusion that in the present case the owners could not in this country maintain an action for a larger amount of freight than that allowed by Spanish law and that the judgment of Bailhache J. must be affirmed, the point of law raised by the special case being there determined in favour of the charterers.

An argument was founded on the exception of restraint of princes. It is unnecessary to decide whether this exception was intended to be mutual and I prefer to express no opinion on the point.

I take it that this judgment decides nothing except that the owners cannot recover more than the freight fixed by Spanish law. How this may affect the legal relations of the

(1) 12 Q. B. D. 589.

C.A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

parties in other respects is not before us and I express no opinion about it. I think the appeal fails and must be dismissed.

SCRUTTON L.J. read the following judgment: This is an appeal from the judgment of Bailhache J. on a special case stated by a commercial umpire and raises a question of general importance as to the effect on a contract to be performed in a foreign country of illegality by the law of the place in which it was to be performed.

The question arises as to the freight payable by English charterers to Spanish shipowners for the transit of jute from Calcutta to Spain on a Spanish ship. The umpire finds that in September, 1918, there came into force in Spain a decree having the force of law fixing the maximum freight on jute (imported into Spain) at 875 pesetas per ton. He adds certain exhibits from which it appears that this decree was part of a system for keeping down the price of goods essential for national welfare by, amongst other means, fixing the freight on goods coming to Spain. And the exhibits, together with the full text of that of November 11, 1916, with which we were furnished, show that penal consequences follow infractions of these laws.

It appears from the special case that on July 2, 1918, Messrs. Ralli Bros. sold to Messrs. Godo & Co., of Barcelona, 28,000 bales of jute at various prices from 118*l.* 10*s.* to 105*l.* per ton, to be shipped by the steamer *Eretza Mendi* from Calcutta to Barcelona. Ralli Bros. were to pay half the freight at Calcutta, Godo & Co. to pay the other half on arrival at Barcelona. The contract document is obscure but the invoice shows that the second half freight was to be paid on account of and as part of the contract price per ton. The *Eretza Mendi* was a Spanish steamer owned by Compañia Naviera Sota y Aznar, a Spanish company with its head office at Bilbao in Spain. Its owners had, on July 3, 1918, chartered the ship to Messrs. Ralli Bros. to load at Calcutta a full cargo of jute, and proceed to Spanish ports as ordered and there deliver the same on being paid freight at the rate of 50*l.*

per ton. Half the freight was to be paid by charterers in London on receipt of telegraphic advice of sailing from Calcutta. The balance of the freight to be paid at the port of discharge by the receivers of the cargo, one half on arrival of the vessel and the remainder concurrent with discharge. The half freight payable at port of discharge was to be paid by cash or approved bills at charterers' option. This half, the freight in question, was payable to Spanish shipowners resident in Spain, for the carriage to and delivery of goods in Spain by a Spanish ship, in Spanish money at a Spanish port of discharge.

On arrival the receivers alleged that a maximum rate of freight for such goods was fixed by Spanish law, and that they could not legally pay more. They paid or tendered what they alleged to be the right amount of freight at 875 pesetas per ton, the maximum freight fixed by Spanish law. The umpire finds that on their own basis, having regard to the rate of exchange, they tendered too little. Complicated proceedings followed in the Spanish Courts. In April, 1919, 23,084 bales had been delivered by the ship, and 6274 bales were still on board. But I understand these proceedings were not brought to ascertain what was the result, if freight was to be paid at 875 pesetas a ton, but to test the claim by the Spanish shipowners that they were entitled to be paid by the English charterer's freight at the rate of 50*l.* per ton, without any regard to the Spanish law.

I accept the contention of the shipowners that the charterers remain liable for the freight, in spite of the provision that half of it is to be paid by the receivers.

But I think they remain liable to pay it in Spanish currency at the Spanish port of discharge to a Spanish company resident in Spain. To pay freight in Spain to a Spaniard for goods to be discharged in Spain at a rate in excess of the maximum freight fixed by Spanish law for the carriage of such goods is illegal by the law of Spain. What then is the effect on the contract of illegality by the law of the place where it is to be performed, such law not being British law?

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Scrutton L.J.

In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws, 2nd ed., p. 553, where he says: "A contract . . . . is, in general, invalid in so far as . . . . the performance of it is unlawful by the law of the country where the contract is to be performed"—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.

The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties might have provided against by their contract, and for which they must be liable, if they had not expressly relieved themselves from liability. This is the old doctrine of *Paradine* v. *Jane* (1): "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It was emphasized by Lord Ellenborough in *Atkinson* v. *Ritchie* (2), where he said: "No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance." And Lord Bowen as late as 1884 in the case of *Jacobs* v. *Crédit Lyonnais* (3) cited Lord Ellenborough's approval of *Paradine* v. *Jane* (1) with approval. But the numerous cases, of which *Metropolitan Water Board* v. *Dick, Kerr & Co.* (4) is a recent example, most of which are cited in McCardie J.'s exhaustive judgment in *Blackburn Bobbin Co.* v. *Allen & Sons* (5) have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions from liability to be grafted by implication on contracts, if the

(1) Aleyn, 26, 27.
(2) (1809) 10 East, 530, 533.
(3) 12 Q. B. D. 589.
(4) [1919] A. C. 119.
(5) [1918] 1 K. B. 540, 546.

parties by necessary implication must have treated the continued existence of a specified state of things as essential to liability on the express terms of the contract. If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that the doing of that act is subject to the implied condition that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. "I will do it provided I can legally do so" seems to me infinitely preferable to and more likely than "I will do it, though it is illegal."

Great reliance was placed by the appellants on the case of *Jacobs* v. *Crédit Lyonnais*. (1) The headnote in that case speaks of "the prohibition by the constituted authorities of the export of esparto from Algeria." I cannot find any authority for this in the case, which only speaks of difficulty from insurrection and Government commands in collecting and transporting cargo to the port of loading. No express exception covered this, and the attempt in the case was to introduce "force majeure," which would be a defence by the French law, into the English contract. If it had been illegal to export esparto from Algeria the question in this case would have arisen. In *Blight* v. *Page* (2) a ship was chartered with fixed lay days to proceed to Libau and load barley. On her arrival there the Russian Government had prohibited the export of barley. Lord Kenyon held the charterer liable for freight, the foreign illegality being no defence to an action for damages. This was followed in *Barker* v. *Hodgson* (3), where a charterer who had undertaken to load at Gibraltar in fixed days and who was prevented from doing so by prohibition to load due to plague was held liable on the same principle: "if he was unable to do the thing, is he not answerable for it upon his covenant?" In sharp

(1) 12 Q. B. D. 589. (2) (1801) 3 Bos. & P. 295n.
(3) 3 M. & S. 267, 270.

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Scrutton L.J.

contrast with these fixed days cases is the decision in *Ford* v. *Cotesworth.* (1) That was a charter to discharge at Callao, no fixed time being mentioned and the law implying a reasonable time. Discharge was prevented for a considerable period by prohibition of landing due to the fear of the arrival of the Spanish Fleet. After a long time discharge was finished. When that case was decided, the interpretation of reasonable time as a reasonable time under the existing circumstances, and not the normal time of discharge in normal circumstances, had not been explained as it subsequently was by the House of Lords in *Hick* v. *Raymond* (2) and *Hulthen* v. *Stewart & Co.* (3) Lord Blackburn in giving the judgment of the Queen's Bench seems to accept the position that reasonable time means normal time, and that the party prevented from performing his contract by an unforeseen circumstance beyond his control would be liable, but distinguishes the case where the act not done is one in which both parties should concur, and which neither can perform, in which case he says that the obligation on each is to use reasonable diligence, and either is excused by events beyond his control. *Ford* v. *Cotesworth* (1) would now, under the House of Lords decisions, be decided as a matter of course in favour of the party sued—for the foreign prohibition would be an existing circumstance to be taken into account in fixing the reasonable time in which the act omitted was by implication to be done. Such reasonable time would not now be construed as normal time under normal conditions. In the Exchequer Chamber the case was again put on reasonable time, as distinguished from fixed time, and the ground that a cause of delay affecting both parties must be considered in fixing reasonable time. In *Cunningham* v. *Dunn* (4) the ship was to proceed to Malta and load dead weight, which both parties knew would be military stores, and then proceed to a Spanish port to load fruit. On arrival at Valencia it was found that the law of Spain did not allow cargo to be loaded on a ship which had

(1) (1868) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544.
(2) [1893] A. C. 22.
(3) [1903] A. C. 389.
(4) 3 C. P. D. 443.

military stores on board, and when it was found that permission could not be obtained the vessel sailed away. The charterer sued her, and the Court of Appeal held that both parties being prevented by superior power neither was liable, citing *Ford* v. *Cotesworth*. (1) The late Mr. Carver forcibly criticises these two cases on the ground that in neither was there really joint disability, but takes the view, in which I concur, that they are both supportable on other grounds, which I take to be that in *Ford* v. *Cotesworth* (1), a reasonable time case, the time must be judged by the then existing circumstances, and that in *Cunningham* v. *Dunn* (2), the parties must be taken to have contracted on the basis that it should be legally possible to load that ship. At the time the two cases were distinguished from *Barker* v. *Hodgson* (3) and other fixed lay day cases, on the ground partly of no fixed time partly on joint inability. It may be possible to put the earlier cases on the ground that a contract to load in fixed days, unless prevented by specified causes, excludes implied causes such as foreign illegality. An instance of this class of case is *Braemount Steamship Co.* v. *Andrew Weir & Co.* (4), where a clause excusing payment of hire in certain named events was not extended to an unnamed event, strikes, which prevented the vessel being profitably used, though "strikes" were included in an exception clause. But in my opinion at the present day, in the absence of very special circumstances, cases which decide that a contracting party who has undertaken to do something in a foreign country is not relieved from his obligation by the fact that such an act is, or becomes, illegal in that foreign country are wrongly decided; and this is the true view to be taken of early cases like *Barker* v. *Hodgson* (3), decided before the Courts had developed the doctrine of continued validity of contracts being dependent impliedly on the existence or continuance of certain states of fact. Bailhache J. treats the case as one of a joint act to be performed by both parties, paying and receiving a fixed amount of freight, in a country where it is illegal to pay or

(1) L. R. 4 Q. B. 127; L. R. 5 Q. B. 544.
(2) 3 C. P. D. 443.
(3) 3 M. & S. 267.
(4) (1910) 15 Com. Cas. 101.

C. A. 1920

RALLI BROTHERS v. COMPAÑIA NAVIERA SOTA Y AZNAR.

Scrutton L.J.

receive such an amount; and such a joint act prevented by illegality as being within the principle of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn* (2), which are binding on him. In view of the fact that the recent decisions of the House of Lords would require or enable the results of those decisions to be justified in quite a different way, I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States. Bailhache J. has arrived at the same result by holding that if there is a contract in spite of its illegality in the place of performance, the charterer is protected by the exception of restraint of princes, rejecting the argument that in this charter the exception clause only protects the shipowner. As the view I have already taken results in the dismissal of the appeal, I prefer to express no opinion on this point. But I may say that as in my experience most charters at the present day avoid the difficulty by using the words "mutually excepted," it would be well in future charters to make clear the intention that the exceptions shall protect both parties.

I understand our decision only to settle the point whether the Spanish shipowner can claim freight from the charterer at the rate of 50*l.* per ton in spite of the law of Spain, and to hold that he cannot. What freight he can claim, in view of the actual facts which are not fully before us, we do not decide.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for shipowners: *Wm. A. Crump & Son.*

Solicitors for charterers: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

W. I. C.

(1) L. R. 4 B. B. 127; L. R. 5 Q. B. 544.

(2) 3 C. P. D. 443.

THE KING *v.* GOVERNOR OF WORMWOOD SCRUBBS PRISON.

1920
March 8.

Emergency Legislation—Defence of the Realm (Amendment) Act, 1915 (5 *Geo.* 5, *c.* 34), *s.* 1, *sub-s.* 7—*Suspension of Trial by Jury—Proclamation ordering—"Special military emergency"—Cessation of—Duration of Proclamation—Defence of the Realm Regulations.*

By s. 1 of the Defence of the Realm (Consolidation) Act, 1914, power was given to His Majesty in Council "during the continuance of the present war to issue regulations . . . . for securing the public safety and the defence of the realm":—

Held, that the regulations thereby authorized were not limited to regulations for the protection of the country against foreign enemies, but included regulations designed for the prevention of internal disorder and rebellion.

By s. 1, sub-s. 7, of the Defence of the Realm (Amendment) Act, 1915: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by proclamation forthwith suspend" the right of trial by jury in the case of offences committed against the regulations and leave the offenders to be tried by courts-martial.

Held, that when a special military emergency has once arisen and a proclamation suspending the right of trial by jury has once been lawfully made, the operation of the proclamation is not limited to the duration of the military emergency, but it remains in force till the end of the war unless revoked sooner.

RULE for a writ of habeas corpus.

By an order dated January 5, 1920, made by the Chief Secretary for Ireland, reciting that on the recommendation of a competent military authority appointed under the Defence of the Realm Regulations, it appeared to him to be expedient that one Patrick Foy, who was resident in Dublin, should, in view of the fact that he was a person suspected of acting, having acted, and being about to act in a manner prejudicial to the public safety and the defence of the realm, be interned, it was ordered that the said Foy should be interned in Wormwood Scrubbs Prison. On January 14 Foy was arrested in Dublin under that order, taken to the prison named, and there detained without being brought before any Court of law.

By the Defence of the Realm (Consolidation) Act, 1914, s. 1, power was given to His Majesty in Council "during the

1920

REX v. GOVERNOR OF WORMWOOD SCRUBBS PRISON.

continuance of the present war to issue regulations for securing the public safety and the defence of the realm," and thereby to authorize the trial by courts-martial of persons committing offences against the regulations.

By s. 1, sub-s. 2, of the Defence of the Realm (Amendment) Act, 1915, where a British subject, not being a person subject to the Naval Discipline Act or to military law, is alleged to be guilty of an offence against any regulations made under the Defence of the Realm (Consolidation) Act, 1914, he may claim to be tried by a jury instead of by a court-martial. Patrick Foy was a British subject and a civilian.

By sub-s. 7: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by proclamation forthwith suspend the operation of this section, either generally or as respects any area specified in the proclamation."

In April, 1916, at a time when a German invasion of Ireland was feared, His Majesty, by a proclamation which recited that "the present state of affairs in Ireland is such as to constitute a special military emergency," ordered the operation of s. 1 of the Defence of the Realm (Amendment) Act, 1915, "to be suspended in Ireland until we see fit to revoke this our proclamation." It was not disputed that that proclamation was validly made. It was still unrevoked at the date of the application for a habeas corpus.

By Regulation 14B of the Defence of the Realm Regulations: "Where, on the recommendation of a competent naval or military authority . . . . it appears to a Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to" internment, the Secretary of State may order him to be interned. By a later clause of that regulation: "In any area in respect of which the operation of s. 1 of the Defence of the Realm (Amendment) Act, 1915, is for the time being suspended, this regulation shall apply in relation to any person who is suspected of acting, or having acted, or of being about to act in a manner prejudicial to the public safety or the defence of

the realm, as it applies in relation to persons of hostile origin or association." A rule nisi for a writ of habeas corpus having been obtained.

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* and *Giveen* for the respondent showed cause. The order of January 5, 1920, under which the applicant is detained, is a perfectly valid order. The proclamation of April, 1916, suspending trial by jury in Ireland did not cease to be effective when the military emergency which gave rise to it disappeared. Having once been validly made, it continues in force until it is revoked or the war comes to an end. Neither of those events has happened. By the Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59), "His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and the present war shall be treated as having continued to, and as having ended on that date for the purposes of any provision in any Act of Parliament, Order in Council, or proclamation." No such declaration has yet been made, there being still three enemy States with which treaties of peace have not yet been signed. Then so long as the proclamation continues to be effective the application of Regulation 14B to Ireland, under which the internment order was made, continues in force. That the conditions of a valid internment order under that regulation have been satisfied cannot be questioned in this Court, for it is for the executive alone to determine whether the person interned was a person who was properly suspected of acting in a manner prejudicial to the public safety, and consequently one whom it was expedient to intern: *Rex* v. *Halliday*. (1) Where a matter is one of ministerial administration, as it is here, and is confided to the discretion of the ministers, "with the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be

(1) [1917] A. C. 260.

1920

REX v. GOVERNOR OF WORMWOOD SCRUBBS PRISON.

controlled by any outside authority, so long as they do nothing that is illegal": *Theodore* v. *Duncan*. (1)

Sir John Simon K.C., *McVeagh* and *Carswell* in support of the rule. The regulations made under the Defence of the Realm Act cannot continue to have validity merely because the war is still technically going on. The war is practically at an end. Peace was signed with Germany on January 10, 1920, and Foy was not arrested till January 14. The whole of the Defence of the Realm legislation, including the regulations, was directed to the protection of the country from foreign foes during the period of war. It was not intended to be used for the suppression of rebellion or the preservation of internal order even during the war, and still less at a time when the war was over. If that is so then the whole foundation of Regulation 14B, under which this internment order was made, disappears, and the regulation ceases to have any validity in any part of the United Kingdom. But even if the applicant's contention is wrong on that point, at all events Regulation 14B ceases to have any validity in Ireland, for it only applies to Ireland by virtue of the proclamation of April, 1916, and the occasion and condition of the making of that proclamation was the existence of a special military emergency which has long since ceased to exist. With the cessation of that emergency the validity of the proclamation and with it the application of Regulation 14B to Ireland terminated. The internment order is therefore void.

EARL OF READING C.J. In this case Sir John Simon, on behalf of the applicant Patrick Foy, obtained a rule calling upon the Governor of Wormwood Scrubbs Prison to show cause why a writ of habeas corpus should not issue for the purpose of putting an end to the detention of the applicant. It was contended that the order of internment under which he is detained is bad upon two grounds: first, that the Regulation 14B under which it purported to be made is no longer operative in any part of the United Kingdom; and secondly, that the application of that regulation to Ireland

(1) [1919] A. C. 696, 706.

continued only so long as the special military emergency, which was the occasion for the making of the proclamation whereby trial by jury was suspended in Ireland, continued to exist. For the purpose of determining whether that contention is well founded it is necessary to examine the terms of the Acts of Parliament which authorized the regulation, and those of the regulation and proclamation themselves. The Defence of the Realm (Consolidation) Act, 1914, gave power to His Majesty in Council "during the continuance of the present war to issue regulations for securing the public safety and defence of the realm," and thereby to authorize the trial by court-martial of persons committing offences against those regulations. By s. 1, sub-s. 2, of the Defence of the Realm (Amendment) Act, 1915, the right of a civilian British subject who was charged with an offence against the regulations to be tried by a civil Court was recognized, and it was for that purpose that the amending Act was passed. At the same time Parliament when so enacting had present to its mind that a situation might arise in which the public safety might be endangered if the party charged with an offence against the regulations were entitled to claim his right to a trial by jury, and accordingly it provided in sub-s. 7 that "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by proclamation forthwith suspend the operation of this section, either generally or as respects any area specified in the proclamation," by which was obviously meant that he was empowered to suspend in such area the right of trial by jury. Under the powers conferred by that sub-section a proclamation was made in April, 1916, reciting that the state of affairs in Ireland at that time constituted such a special military emergency, and ordering "that the operation of the said section be suspended in Ireland until we see fit to revoke this our proclamation." It is not disputed that a special military emergency existed at that date, and that the proclamation was validly made. When once that proclamation was validly issued Regulation 14B came into operation and power was conferred upon a Secretary of State to order the internment of

1920

REX v. GOVERNOR OF WORMWOOD SCRUBBS PRISON.

Earl of Reading C.J.

a person who was suspected of acting in a manner prejudicial to the public safety and the defence of the realm. On January 5, 1919, the Chief Secretary for Ireland, acting under that regulation, made the order under which the applicant is detained. That order, after reciting that "On the recommendation of a competent military authority appointed under the Defence of the Realm Regulations it appears to me that for securing the public safety and the defence of the realm it is expedient that the said Patrick Foy should, in view of the fact that he is a person suspected of acting, having acted, and being about to act in a manner prejudicial to the public safety and the defence of the realm, be subjected to such obligations and restrictions as are hereinafter mentioned," proceeded to order his internment in Wormwood Scrubbs Prison. Sir John Simon has emphasized the statement of Foy that he is not a member of any political association and has not taken part in any acts which would justify his being suspected of acting in the manner suggested. But that is a matter which this Court cannot entertain, for the bona fides of the competent military authority in making the recommendation is not challenged, nor is it the main ground of the objection to the order. The substantial grounds of that objection are these: In the first place it was said that the power to make regulations at all was limited to the period of the war and to the purpose of securing the defence of the realm, and it was contended that the meaning of that was that the regulations were to be designed to protect the country against foreign enemies, and not against internal disorder or rebellion, and it was said that as the war with Germany was ended and the fear of foreign invasion was removed, the whole reason for the continued operation of the regulations was gone. To my mind that construction is not right. It gives a too limited meaning to the words of the statute. So long as the war continues—and for a reason which I will presently mention it does still continue—acts of rebellion which are in effect military operations against the executive power, must be acts which have the effect of weakening the forces which this country can oppose to the

enemy, and as such must be acts endangering the public safety and the defence of the realm. Secondly, it was said that the proclamation suspending trial by jury in Ireland and with it the application of Regulation 14B to that country had ceased to be operative, inasmuch as the "special military emergency" which was the foundation of the power to make the proclamation had ceased to exist. The answer to that contention is that, even if it is material to consider whether the military emergency has come to an end, it is not a matter which this Court can consider; whether the emergency continues to exist or not it is for the executive alone to determine. In *Rex* v. *Halliday* (1) the House of Lords, when considering the validity of the first clause of Regulation 14B, held that the question whether there is ground for suspicion that a particular person may be disposed to help the enemy is by the regulation thrown upon the Secretary of State. The same principle must apply to the question of the continuance of the military emergency. The effect of that decision is to place upon the executive the responsibility of determining whether the necessary facts exist, and to take away from the Courts the power which they would otherwise have had of dealing with such cases as the present. It is of course always to be assumed that the executive will act honestly and that its powers will be reasonably exercised. When once the Court is satisfied that the proclamation was validly issued and that the war is still continuing, it has no power to interfere and to consider whether or not circumstances exist which justify the continuance of the proclamation. No doubt all these statutory powers are limited to the duration of the war. The Act of 1914 expressly says so, they are to be "during the continuance of the present war," but subject to that limit it is for the executive to decide when they shall cease. It is to be observed, with regard to the objection that the proclamation was expressed to continue in force "until we see fit to revoke this our proclamation," that those are words of limitation, not extension; they meant that it was to last as long as the war unless revoked sooner, not

(1) [1917] A. C. 260.

1920

REX v. GOVERNOR OF WORMWOOD SCRUBBS PRISON.

Earl of Reading C.J.

that it was under any circumstances to extend beyond the termination of the war. As the executive has not seen fit to revoke the proclamation it continues in force, unless the war is at an end. But the war is not at an end; we are still in a state of war. Though the war with Germany has come to an end the termination of the war has not yet been declared. By the Present War (Definition) Act, 1918, it is left to the King in Council to declare when the war has come to an end, and that has not yet been done, there being certain other enemy Powers with whom treaties of peace have not yet been signed. For the reasons which I have given this Court has no power to issue the writ of habeas corpus which has been asked for, and consequently the rule must be discharged.

BRAY J. I am of the same opinion. The applicant complains that he is unlawfully detained in His Majesty's prison at Wormwood Scrubbs. The answer of the Crown is that the authorities are justified in detaining him under an order made by the Chief Secretary for Ireland, which order, it is said, he was justified in making, having regard to the statutes and the regulations which have been made thereunder. The order recites that Patrick Foy "is a person within an area in respect of which the operation of s. 1 of the Defence of the Realm (Amendment) Act, 1915, is for the time being suspended." That is challenged. It is said that the proclamation in fact is spent, and that the suspension that once existed has ceased. The clause authorizing the proclamation is s. 1, sub-s. 7, which is as follows: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by proclamation forthwith suspend the operation of this section, either generally or as respects any area specified in the proclamation." Sir John Simon argues that "suspend" there means suspend during the existence of the invasion or other special military emergency. He contends that we must read those words into the sub-section, but it would require very cogent reasons to satisfy us that we ought to do so. Those words ought

to be inserted only if we can gather from the language of the statute that the Legislature intended the suspension to be to that extent limited. What is the ground on which he says we ought to insert them? As I understand, the ground is that otherwise the Act would be productive of a hardship. The answer is that the proclamation and the regulation are not to operate except where there is an occasion for securing the public safety or the defence of the realm. It seems to me that the Legislature has intentionally omitted any limit to the suspension. Of course the suspension must be confined to the duration of the war because all these powers are intended to take effect only so long as the war continues. If it had been intended to limit the suspension to the existence of the particular invasion or emergency the result would have been this, that as soon as the invasion was over or the special emergency had ceased the proclamation would come to an end notwithstanding that there might be the gravest apprehension that the emergency might arise again within a comparatively short time. Further, whenever any person interned under the regulation complained that there was no power to intern him it would necessitate an inquiry as to whether the special military emergency had ceased to exist. It seems to me impossible to suppose that the Legislature intended such a conclusion. Prima facie suspension means suspension for an indefinite time, subject of course to the continuance of the war. But subject to that there is in my opinion no limit to the suspension. Then if that be so Foy was a person within an area in which trial by jury was for the time being suspended. The next recital is that "on the recommendation of a competent military authority . . . . it appears to me that for securing the public safety and the defence of the realm it is expedient" that the said Foy should be interned. It is challenged that it appeared to the Secretary of State to be necessary "for securing the public safety and the defence of the realm." It is suggested that those words must be understood as limited to securing the country against some foreign foe. I do not think that they are so limited, because, as my Lord has pointed out,

1920

REX v. GOVERNOR OF WORMWOOD SCRUBBS PRISON.

Bray J.

any internal disturbance or rebellion during the continuance of a war must weaken the power of the Empire to meet the enemy, and must therefore endanger the public safety and the defence of the realm. Then it is suggested in the applicant's affidavit that he cannot be reasonably suspected of acting in a manner prejudicial to the defence of the realm as he has never taken part in any political controversy. But that is a matter that we cannot go into. It has not been put in issue by the Crown, and for a very good reason, that it is quite irrelevant. It is not competent for this Court to inquire whether there are grounds for so suspecting him. That is a matter which, as *Rex* v. *Halliday* (1) points out, is left to the Secretary of State alone to decide. I am of opinion that the objections raised to the validity of the internment order fail, and that the rule for a habeas corpus must be discharged.

AVORY J. I am of the same opinion. Two points have been taken on behalf of the applicant. The first is that the words "the public safety" in the Defence of the Realm (Consolidation) Act and in the regulations must be limited to safety against a foreign foe, and that the regulations which are made under that Act are not designed to afford protection against internal disorder. Now I find in the Act itself evidence to the contrary, for express power is given by s. 1, sub-s. *c*, to make regulations, amongst others, "to prevent the spread of false reports, or reports likely to cause disaffection to His Majesty." If there is power to make regulations to prevent reports likely to cause disaffection to His Majesty it seems to me plain from the very words of the statute that those regulations may be designed to prevent internal disorder. Though quite apart from the authority of the statute itself I should think it would only be necessary at the present time to ask any persons residing in Ireland whether they think the public safety is endangered by the state of things there prevailing. The second point is that s. 1, sub-s. 7, of the Act of 1915 only authorizes the suspension of the operation of that section during an invasion

(1) [1917] A. C. 260.

or during a special military emergency arising out of the war. If it were necessary for this Court to determine, which I do not think it is, whether the special military emergency, which undoubtedly arose in April, 1916, is still existing, I should have no hesitation, speaking for myself, upon the affidavits which are before us, in holding that it does. But in my opinion it is not for the Court to determine that as a question of fact. The proclamation having once been made upon a special military emergency the operation of the section is suspended until the termination of the war or until the proclamation has been revoked by an Order in Council. Upon these grounds I agree that both the applicant's contentions fail.

Rule discharged.

Solicitor for the applicant: *J. H. Macdonnell.*
Solicitor for the respondent: *Treasury Solicitor.*

J. F. C.

EVANS *v.* ENEVER.

1920

March 23.

Landlord and Tenant—Recovery of Possession—Breach of Covenant—Forfeiture—Waiver.

The plaintiffs let to the defendant a portion of a house for twelve years from Midsummer, 1914. The lease contained a proviso for re-entry in case the lessee should become bankrupt, or if the rent should be in arrear for twenty-one days. In July, 1918, the defendant was adjudicated a bankrupt. On January 21, 1919, the two quarters' rent due at Michaelmas and Christmas, 1918, were in arrear. On January 21, 1919, the plaintiffs sued the defendant on a specially indorsed writ claiming possession of the premises, on the ground that the lease was liable to forfeiture for nonpayment of the rent. The defendant, taking advantage of the provisions of s. 212 of the Common Law Procedure Act, 1852, paid the rent and costs to the plaintiffs, and therefore those proceedings came to an end. In the following May the plaintiffs sued the defendant for possession, claiming that the lease was forfeited by reason of the defendant's bankruptcy:—

Held, that, notwithstanding that the rent which was paid to the

1920

EVANS v. ENEVER.

plaintiffs in the first action had accrued due subsequently to the date of the adjudication, its acceptance by the plaintiffs did not operate as a waiver of the forfeiture.

TRIAL of two actions before Lord Coleridge J.

By a lease dated June 13, 1914, the plaintiffs let to the defendant for the term of twelve years from Midsummer, 1914, the second floor of the premises numbered 33 and 34, Haymarket, at a rent of 155*l.* payable on the usual quarter-days. The lease contained a proviso for re-entry if the lessee should become bankrupt, and also if the rent should be in arrear for twenty-one days. By a lease dated March 5, 1915, the plaintiffs let to the defendant for a similar term the third floor and two rooms in the attic in the same houses at a rent of 85*l.* payable on the same quarter-days. The lease contained a covenant by the lessee not to underlet or part with the possession of any part of the demised premises. It also contained a proviso for re-entry if the lessee should become bankrupt, or if he should commit a breach of any of the covenants, or if the rent should be in arrear for twenty-one days. The defendant had promoted a certain company called Alexander Allan & Co., of which he held or controlled all the shares, and he professed to have taken the said two leases as trustee for that company, and by a letter of May 15, 1918, addressed to the company he declared himself to be a trustee of the leases for them. But no notice of the alleged trusteeship was at any time given to the plaintiffs, as the defendant knew that they refused to grant a lease to a limited liability company. On April 13, 1918, the said company purported to let to a Miss Muirhead, who acted as their secretary, the third floor and attic of the said premises for one year at a rental of 2*l.* a week, and Miss Muirhead entered into occupation accordingly. Of that sub-letting the plaintiffs had no notice, and it was without their consent. On July 30, 1918, the defendant was adjudicated bankrupt. The trustee in bankruptcy disclaimed the leases. On January 21, 1919, the two quarters' rent due at Michaelmas and Christmas, 1918, were twenty-one days in arrear. On that date the plaintiffs served the defendant with two specially indorsed

writs claiming possession of the premises comprised in both the leases, on the ground that they had become liable to forfeiture for nonpayment of the rent, and claiming also the amounts of the rent. The defendant took advantage of the provisions of s. 212 of the Common Law Procedure Act, 1852, and paid to the plaintiffs the amounts of the rent together with the costs, and thereupon those proceedings came to an end. At the time of their accepting that rent the plaintiffs had full knowledge of the defendant's bankruptcy. On May 7 the plaintiffs brought the two present actions, one against the defendant claiming possession of the second floor, on the ground that the lease of that floor was forfeited by the defendant's bankruptcy, and the other against the defendant and Miss Muirhead, claiming possession of the third floor and attic, on the grounds (a) that the defendant had become bankrupt, and (b) that he had in breach of his covenant parted with possession. The defence to both actions was that the plaintiff, by accepting in the earlier action the rent which had accrued due subsequently to the dates of the alleged forfeitures had waived their right of re-entry. At the date of the trial the defendant was still an undischarged bankrupt.

Hansell for the plaintiffs. Where an action is brought for the forfeiture of a lease for nonpayment of rent the acceptance by the landlord of the rent paid under s. 212 of the Common Law Procedure Act, 1852, does not operate as a waiver of an earlier forfeiture, for the acceptance is, in that event, not a voluntary act. That section, which provides that, if at any time before the trial of an ejectment for nonpayment of rent the defendant pays to the landlord, or into Court if he refuses it, the rent in arrear and the costs, all further proceedings in the ejectment shall cease, is a provision enacted for the benefit of the defendant, not of the plaintiff. In *Toleman* v. *Portbury* (1) a landlord brought ejectment against his tenant for breach of covenant in permitting a sale on the premises without his consent, and also

(1) (1871) L. R. 6 Q. B. 245, 251.

1920

EVANS v. ENEVER.

for nonpayment of rent. The plaintiff having refused to accept the rent, the defendant paid it into Court under s. 212. It was held by the Queen's Bench that that payment was no waiver of the forfeiture, and their decision was affirmed in the Exchequer Chamber. (1) No doubt there is this distinction between that case and the present, that there the two grounds of forfeiture were included in the same action, whereas here they were not, but that is immaterial. At the date of the former case summary procedure under Order XIV. had not been introduced. The object in severing the grounds of forfeiture here was to enable the plaintiffs to get possession quickly, and Order III., r. 6, does not allow a special indorsement in an action for the recovery of land by reason of forfeiture except where the ground of forfeiture is nonpayment of rent. A further distinction is that here the plaintiffs did not refuse the money. But that again makes no difference. Kelly C.B., who delivered the judgment of the Exchequer Chamber in *Toleman* v. *Portbury* (2), was evidently of that opinion. He there said: "But it is said it is an injustice that the plaintiff should be able to maintain the forfeiture and still have the rent; but I cannot see this: the plaintiff is clearly entitled to the money, either as rent if there were no forfeiture, or as mesne profits if there was." Here the plaintiffs were entitled to the money as mesne profits, and their rights cannot be affected by the name by which it is called. It is true that here in the first action the plaintiffs joined with their claim for possession a claim for the rent, but that is because the form of claim under Order XIV. in an action for recovery of land given in Appendix C, s. 7, expressly includes a claim for the rent, and the forms have to be strictly followed. By bringing the first action for recovery of possession in January, 1919, the plaintiffs irrevocably elected to determine the tenancy: *Jones* v. *Carter* (3), and nothing done after that election can have the effect of reaffirming the tenancy. Thus where a landlord after commencing an action of ejectment for breaches of covenant

(1) (1872) L. R. 7 Q. B. 344. (2) Ibid. 352.
(3) (1846) 15 M. & W. 718.

distrained for rent accrued due subsequently to the date of the breaches, it was held that the distress, though it might be a trespass, was no waiver of the forfeiture: *Grimwood* v. *Moss.* (1)

Haldin K.C. and *S. Ford* for the defendant. The acceptance of the rent in the first action was a perfectly voluntary act, and therefore operated as a waiver of the right of re-entry on the other grounds. *Toleman* v. *Portbury* (2) is plainly distinguishable. There the money was not accepted by the plaintiff. He refused it, and it was paid into Court, where it remained. No doubt the plaintiff cannot prevent the defendant paying the rent into Court, but he can help accepting it. All the members of the Court of Queen's Bench laid stress on the fact that the plaintiff had not accepted the money. Hannen J. said: "He did not receive the money, he merely submitted to the order, which he could not prevent." Moreover, here the plaintiffs actually claimed the rent on their writ. It was not obligatory on them slavishly to follow the form to that extent, and if it was not, they cannot avoid the conclusion that by claiming the rent they waived the forfeiture: *Dendy* v. *Nicholl.* (3) The plaintiffs apparently do not rely on the fact that the defendant is still an undischarged bankrupt. Bankruptcy is not a continuing breach of the lease; it is a breach which occurs once for all, at the time of adjudication. This seems to follow from *Smith* v. *Gronow* (4), where it was held by Wright J. that a forfeiture by reason of the lessee's adjudication was not affected by a subsequent annulment of the bankruptcy. Here the plaintiffs treated the tenancy as continuing as late as March, 1919, for in that month they served the defendant with a notice requiring him to remedy the breaches complained of.

Hansell in reply. It was no doubt held in *Dendy* v. *Nicholl* (3) that a right of re-entry for breach of a covenant in a lease is waived by the lessors bringing an action for rent accruing subsequently to the breach. But there the plaintiff did not demand possession, he sued for the rent

(1) (1872) L. R. 7 C. P. 360.
(2) L. R. 7 Q. B. 344, 352.
(3) (1858) 4 C. B. (N. S.) 376.
(4) [1891] 2 Q. B. 394.

1920

EVANS v. ENEVER.

alone. Here the claim for the rent was merely accessory to the main claim which was for forfeiture. That is the distinction between the two cases.

LORD COLERIDGE J. In this case the plaintiffs let certain floors in a house by two leases to the defendant. Both leases contained a proviso for re-entry in the event of the defendant becoming bankrupt or of the rent being in arrear for twenty-one days. On July 13, 1918, the defendant was adjudicated bankrupt, and that fact was known to the plaintiffs, but they did not take immediate steps to recover possession of the premises. Time ran on, and the two quarters' rent due at Michaelmas and Christmas, 1918, became in arrear. The plaintiffs, therefore, had two grounds on which to forfeit the leases. On January 21, 1919, they brought two actions for recovery of possession of the premises, one in respect of the second floor under one lease, and the other in respect of the third floor and attic under the other lease; but, being desirous of getting the benefit of the speedy remedy provided by Order XIV., they based their claim only upon the ground of the rent being in arrear. The defendant took advantage of the provisions of s. 212 of the Common Law Procedure Act, 1852, and paid the rent due, together with the costs, to the plaintiffs. What was the legal effect of that payment? Was it directly or inferentially an acknowledgment of the existence of the tenancy after July 13, 1918? Now, the payment was made in consequence of an action in which the plaintiffs claimed the rent. And it is clear from the case of *Dendy* v. *Nicholl* (1) that an action for rent accrued due subsequently to a ground of forfeiture known to the plaintiff waives the forfeiture if the action is brought for the rent alone. That is well recognized law which has never been disputed. But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position.

(1) (1858) 4 C. B. (N. S.) 376.

1920

EVANS v. ENEVER.

Lord Coleridge J.

Now here the action was only incidentally an action for rent, it was mainly an action for recovery of possession for breach of the conditions of the lease, the breach being nonpayment of rent, and the defendant had a statutory right to dispose of that breach by paying the rent, which course he adopted. The landlord, of course, could refuse to take the rent; but what is to happen if he accepts it? I do not observe that this question has been the subject of any direct decision, but there is a dictum in *Toleman* v. *Portbury* (1) that the acceptance of the rent under those circumstances will not operate as a waiver of the earlier forfeiture. In that case the landlord refused to accept the rent, and it was paid into Court, and for all that appears from the report, it may be there still, but Kelly C.B., in delivering the judgment of the Exchequer Chamber, said: "But it is said it is an injustice that the plaintiff should be able to maintain the forfeiture and still have the rent; but I cannot see this: the plaintiff is clearly entitled to the money, either as rent if there were no forfeiture, or as mesne profits if there was." If that view is correct, the claim for possession being met in that way, the plaintiffs' acceptance of the rent does not prevent them from relying in the later action upon the adjudication in bankruptcy, which took place before the rent accrued due. There must be judgment for the plaintiffs for possession and mesne profits.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *G. & G. Keith.*
Solicitor for the defendant: *E. A. Fuller.*

(1) L. R. 7 Q. B. 344, 352.

J. F. C.

1920

March 25, 26.

BAKER *v.* LLOYD'S BANK, LIMITED.

[1917. B. 924.]

Banker—Lien—Contingent Liability—Customer's Declaration of Insolvency—Deed of Assignment for Benefit of Creditors—Payment of Debts as on Bankruptcy—Secured Creditor—Set Off—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 30, *sub-ss.* 3, 4, 8; *s.* 31.

The defendants acted as bankers for a firm up to February 3, 1914, when the firm being insolvent by deed assigned all their property to the plaintiff as trustee for their creditors. The deed provided that payments to the creditors should be made upon the basis of a bankruptcy distribution of the property and that secured creditors should have the same rights as under a bankruptcy. At the date of the deed the firm had 2934*l.* to the credit of their current account in the defendant bank, and the bank held certain shares as security for an advance to the firm. These shares were subsequently sold by the bank and realized 812*l.* in excess of the amount of the advance to the firm. Before February 3, 1914, the firm had discounted with the bank a number of bills of exchange, which matured after that date, and in respect thereof the firm became the debtors of the bank to the amount of 19,941*l.* In an action by the plaintiff as trustee under the deed to recover from the bank the two sums of 2934*l.* and 812*l.*, the bank claimed a lien on those sums and also to set off a sufficient portion of 19,941*l.* against those sums:—

Held, that the bank's claim was right on both points.

Alsager v. *Currie* (1844) 12 M. & W. 751 and *Collins* v. *Jones* (1830) 10 B. & C. 777 followed.

Action tried by Roche J. without a jury.

By an indenture dated February 3, 1914, a firm carrying on business as Fry, Miers & Co. assigned to the plaintiff as trustee all the real and personal property of the firm for the benefit of the firm's creditors. Clause 5 of the deed provided that the trustee should pay and apply the trust property after certain prior payments: "(*c.*) In payment to the creditors by such dividends and at such times as the trustee shall think fit of all such debts and claims as would be entitled to rank for dividend against the trust property if the same were being administered and distributed in bankruptcy and in such priorities and in accordance with such rules and equities as are applicable to the administration and distribution of joint and separate estates in bankruptcy." By

clause 14 : " It shall be lawful for any creditor who holds any mortgage lien pledge charge or other security on or over any joint or separate property of the debtors or any of them to take the full benefit of such mortgage charge lien pledge or other security subject to the provisions of Schedule II. of the Bankruptcy Act, 1883, so far as they refer to proofs by secured creditors."

The defendants were at all material times the firm's bankers. At the date of the execution of the deed, of which the defendants had notice, the firm's current account with the defendants showed a credit balance of 2934*l.*, and the defendants held 700 Continental Can Company's preference shares belonging to the firm as security for an advance made by the defendants to the firm. Shortly after February 3, 1914, the defendants sold these shares and realized a sum of 812*l.* in excess of the sum due from the firm in respect of the advance from the defendants. The plaintiff claimed in this action the two sums of 2934*l.* and 812*l.* as part of the property of the firm passing by the deed.

At the date of the execution of the deed there were outstanding twelve bills of exchange for large sums, of one of which the firm were the drawers, of another the firm were the acceptors, and of the remainder the firm were the indorsers. The firm had discounted these bills with the defendants. They all fell due shortly after February 3, 1914, and were dishonoured, and in respect thereof the firm became indebted to the defendants in the sum of 19,941*l.* The defendants claimed to set off a sufficient portion of that sum against the two sums of 2934*l.* and 812*l.* Alternatively, they claimed a lien on those sums, and further to have the benefit of s. 38 of the Bankruptcy Act, 1883, or s. 31 of the Bankruptcy Act, 1914.

The defendants gave their assent to the deed on June 11, 1914.

Schiller K.C. and *A. M. Latter* for the plaintiff. At the date of the deed of assignment and notice to the defendants there was no existing or ascertained debt due from the firm to the

1920

BAKER v. LLOYD'S BANK.

defendants, but only a contingent liability. A banker's lien can only be exercised in respect of an actual liability: Grant on Banking, 6th ed., p. 306; *Jeffryes* v. *Agra and Masterman's Bank* (1); *Bower* v. *Foreign and Colonial Gas Co.* (2); *Rogerson* v. *Ladbroke.* (3) The defendants could not have prevented the firm from drawing out the whole of their credit balance the day before the deed was executed, and the plaintiff's rights as assignee accrued the moment the deed was executed: *Read* v. *Brown.* (4) The position is the same with regard to the claim to a set off. A debtor cannot set off against the debt due from him to an assignee a debt which has accrued due to him from the assignor after the date of the notice of assignment, even though that debt is the result of a contract made before the assignment, unless the transaction clearly shows an intention that there shall be a set-off: *Watson* v. *Mid Wales Ry. Co.* (5); *Young* v. *Bank of Bengal* (6); and that is not the case here. The defendants further rely on s. 38 of the Bankruptcy Act, 1883, reproduced in identical terms in s. 31 of the Bankruptcy Act, 1914, which provides for a set-off where there have been mutual debts and credits between a bankrupt and another person. But those sections are not incorporated into this deed of assignment, and this is not a case of bankruptcy. Clause 5, para. (*c*), of the deed only means that the creditors are to receive their dividends in the same way as if the estate were being administered in bankruptcy; that clause does not give the defendants a right of set off: see *Baker* v. *Adam* (7), where Hamilton J. held that where a deed of assignment provided for distribution "according to the law of bankruptcy," these words were descriptive of a rateable payment by a series of instalments, and did not import an obligation to allow a set off under the mutual dealings section of the Bankruptcy Act.

R. A. Wright K.C. and *Hansell* for the defendants. It is true that at the date of the execution of the deed the liability

(1) (1866) L. R. 2 Eq. 674.
(2) (1874) 22 W. R. 740.
(3) (1822) 1 Bing. 93.
(4) (1888) 22 Q. B. D. 128.
(5) (1867) L. R. 2 C. P. 593.
(6) (1836) 1 Moo. P. C. 150.
(7) (1910) 15 Com. Cas. 227.

of the firm on the bills of exchange was only a contingent liability, but the execution of the deed was a declaration of insolvency, and that involved a valuation of the contingent liability, thus converting it into an actual liability : *Alsager* v. *Currie* (1); *Collins* v. *Jones* (2); *Roxburghe* v. *Cox* (3); and the defendants can therefore exercise their lien, and they have also a set off. Further, the effect of clauses 5 (*c*) and 14 of the deed is to give the defendants the same rights as would be the case if the firm's assets were being administered in bankruptcy, and therefore the defendants have a good set off under s. 31 of the Bankruptcy Act, 1914. *Baker* v. *Adams* (4) is distinguishable, for in that case the creditor had not assented to the deed of assignment, whereas here the defendants did so, and their assent must be taken to have been given on the terms that all their rights with regard to the firm's liability to them were preserved.

[*Misa* v. *Currie* (5); *Brandao* v. *Barnett* (6); *Davis* v. *Bowsher* (7); *In re Bowes* (8); *Jones* v. *Peppercorne* (9); *Ponsford, Baker & Co.* v. *Union of London & Smith's Bank* (10); and *Hardy* v. *Fothergill* (11) were also referred to.]

Schiller K.C. replied.

ROCHE J. (after stating the facts). The case for the respective parties is as follows: The plaintiff says he is entitled to the two sums of 2934*l.* and 812*l.* without allowing to the bank any set off or credit in respect of the deficiency on the bills which were discounted by the bank for the firm. The bank, on the other hand, claim to retain those two sums on the ground that they are entitled either to set off against their liability to pay those two sums the amount that is due to them in respect of the bills, or, alternatively, to exercise a lien upon those two sums, or the securities from which the sum of 812*l.* resulted. The matter turns mainly, if not entirely,

(1) 12 M. & W. 751.
(2) 10 B. & C. 777.
(3) (1881) 17 Ch. D. 520.
(4) (1910) 15 Com. Cas. 227.
(5) (1876) 1 App. Cas. 554, 569.
(6) (1840) 1 Man. & G. 908; (1846) 12 Cl. & F. 787.
(7) (1794) 5 T. R. 488.
(8) (1886) 33 Ch. D. 586.
(9) (1858) Johns. 430.
(10) [1906] 2 Ch. 444.
(11) (1888) 13 App. Cas. 351.

1920

BAKER v. LLOYD'S BANK.

Roche J.

upon the construction of the deed of assignment. The bank were assenting parties to that deed, and they rely upon the provisions of clause 5 (*c*) and of clause 14. The effect of those two clauses is that clause 5 (*c*) is a provision for payment to creditors to be made upon the basis of a bankruptcy distribution of the property; and clause 14 provides that creditors who are secured creditors are to have the same rights as they would have under a bankruptcy. In my judgment the bank are right and justified in relying upon those clauses. The plaintiff contends that those clauses do not assist the bank, and that no right either of set off or lien can be asserted in respect of the sums that might become due upon the bills, because at the date of the assignment the liability of the firm in respect of the bills was only a contingent, and not an actual, liability. It is true that the liability was contingent in this sense, that the amount that would become due in respect of the bills was not ascertained, but it was in my judgment certain that there would be a deficiency, and a deficiency of a considerable amount, in respect of the bill of which the firm were acceptors. They had at the date of the assignment declared that they were insolvent. With regard to the bills of which they were indorsers, an indorser undertakes that the bills on which his name appears as a party shall be paid at maturity. The declaration by the firm that they were insolvent and unable to meet their liabilities amounted to a repudiation of their ability to perform that undertaking. Accordingly, in my judgment, both by the rules of bankruptcy and common law there was an actual liability in respect of the bills.

As regards the cases, the plaintiff relies upon *Jeffryes* v. *Agra and Masterman's Bank* (1) and *Young* v. *Bank of Bengal* (2); but, in my judgment, those cases are not applicable to the circumstances of the present case, and the bank are justified in relying upon *Alsager* v. *Currie* (3) and *Collins* v. *Jones*. (4)

The two last-mentioned cases show that, on February 3,

(1) L. R. 2 Eq. 674.
(2) 1 Moo. P. C. 150.
(3) 12 M. & W. 751.
(4) 10 B. & C. 777.

there was, according to bankruptcy rules, a debt which could be set off in respect of those bills as between the firm and the bank. I find that the same rule of set off applies in the circumstances of this case as between the bank and the assignee, the plaintiff in this action. *Hardy* v. *Fothergill* (1) shows that a claim such as this would be a provable debt in bankruptcy.

With regard to the objection urged with persistency and force by Mr. Schiller that those rules and cases do not apply inasmuch as this is not a bankruptcy, I find, for the reasons which I have indicated in the earlier part of my judgment, that the same rule applies in this case, because it was a declared insolvency, and because by para. (*c*) of clause 5 of the deed, there was a special provision for distribution as in bankruptcy. It is said that para. (*c*) read literally only provides for payment to the creditors of dividends in the same manner as they would be paid if there were a bankruptcy, and not for the measurement of their claims and the enforcement of their rights in the same manner. But, in my judgment, if payment is to be made under that clause in accordance with the bankruptcy rules of distribution, the fair construction of the clause is that the debts which are to be paid are to be proved and established and dealt with according to the same rules. Those rules include the provisions as to mutual credit and set-off to which I have already referred, and which are to be found in s. 31 of the Bankruptcy Act, 1914. Another rule which is material, and to which I have been referred, is contained in s. 30, sub-ss. 3, 4 and 8.

That is sufficient to dispose of the case except as regards the shares which were held by way of security. With regard to those, and indeed to the whole of the case, the bank rely, and, in my judgment, rightly, upon clause 14 of the deed. The bank, unless indeed they are defeated for one reason which I shall deal with in a moment, had a lien upon the balance due on the general account of the assignors and upon the shares deposited by the assignors. In my judgment, clause 14 maintains for them that right. The argument against the

(1) 13 App. Cas. 351.

1920

BAKER v. LLOYD'S BANK.

Roche J.

assertion of the right in respect of the Can Company's shares is aptly expressed in para. 5 of the statement of claim as follows: "The relevant conditions of the advances" which were under discussion, "were that a special and distinct account should be opened on account of the advance in respect of the said shares and that the defendants should hold the said shares on behalf of the firm as security for the specific advance thereon and such advance only." I am unable to find—indeed, I find the contrary—that there was any special bargain that the shares should be held "for the specific advance thereon and such advance only"; still less was there any agreement that any surplus over the amounts advanced upon the shares should be repaid by the defendants "free from any lien or set off in respect of any other transactions whatever." There was no such express agreement, and, in my judgment, no such agreement is to be implied.

There is one last matter I should mention. Mr. Hansell, in summing up the case for the bank contended that for yet another reason the bank were entitled to judgment—namely, that the bank had assented to the deed of assignment, which they did in June, 1914, upon the basis of their debt being dealt with in the manner in which I have dealt with it in this judgment, that is to say, upon the basis of their being secured creditors or entitled to set off the various sums the one against the other. With regard to that, it is true and significant that from the time when a draft statement of affairs was issued in February, 1914, and a more detailed account was rendered by the trustee, the present plaintiff, in March, 1914, no question was raised but that the bank were in the same position as they will be under this judgment. The accounts which were issued dealt with the bank as secured creditors and entitled to this set off. I am satisfied that the bank never would have dreamt of assenting to this deed had they been otherwise dealt with. It is hardly disputed that in bankruptcy they would have been entitled to these rights. I am satisfied that they never would have waived the rights which they would have enjoyed under bankruptcy, but

would have put the firm into bankruptcy, and would not have assented to the assignment, unless it had been on the basis of the accounts which they had already received. It is unnecessary for me to decide the case on this ground because I have already decided in favour of the bank on the other ground. It is sufficient for me to say that this point has been taken, and, in my judgment, it would require very serious consideration if it arose for decision. There will be judgment for the bank on the claim and on the counterclaim, which is consequential upon the claim, with the costs of the action.

Judgment for defendants.

Solicitors for plaintiff: *Gilbert Samuel & Co.*
Solicitors for defendants: *Linklaters & Paines.*

F. O. R.

FISHER, REEVES & COMPANY, LIMITED *v.* ARMOUR & COMPANY, LIMITED.

1920 *April* 15, 16.

[1920. F. 215.]

Sale of Goods—Sale "ex store"—Goods in Lighters.

Certain goods were bought by the plaintiffs from the defendants "ex store" Rotterdam. As at the material time there was a glut of goods at Rotterdam and the warehouses were full, the goods in question were stored in lighters.

Held, that the word "store," as distinguished from "warehouse," is a general term which may appropriately be used to describe any place in which goods are for the time being stored, and therefore that the goods in question could be correctly described as being in store and could properly be sold "ex store."

ACTION tried by Bailhache J. as a commercial cause.

By a verbal contract made on November 4, 1919, the plaintiffs bought from the defendants 500 cases of boiled beef then at Rotterdam. By a letter of the same date the plaintiffs wrote to the defendants: "We beg to confirm purchase of 500 cases . . . . South American beef spot Rotterdam

1920

FISHER, REEVES & Co. v. ARMOUR & Co.

at 22.25 dollars per case. We shall be glad to have your confirmation of this transaction in due course." The defendants sent an invoice, and on November 14 wrote to the plaintiffs as follows: "Referring to your call on us this afternoon in reference to the 500 cases . . . . boiled beef which you recently bought from us ex store Rotterdam, this is to advise you that the goods in question were shipped to Rotterdam 'in transit.' You should therefore experience no difficulty in moving them to another point." The plaintiffs paid for the goods and obtained a delivery order. In December the plaintiffs, before taking actual delivery, became aware that the goods were, and had been for some considerable time, in lighters, owing to the fact that the Rotterdam warehouses were full; thereupon they purported to repudiate the contract on the ground that the goods, being in lighters, could not be sold "ex store," and they now claimed to recover the amount they had paid.

A witness was called by the plaintiffs who said that the word "store" meant a warehouse on land.

Jowitt (*Hastings K.C.* with him) for the plaintiffs. The words "ex store" mean that the goods are to be delivered out of a warehouse on land; they cannot properly be applied to delivery out of a lighter. Goods in lighters are exposed to greater risk than in a warehouse, and the cost of keeping them there is much greater.

Bevan K.C. and *Claughton Scott* for the defendants. Assuming that the words "ex store" form part of the contract between the parties, the goods in question could properly be sold "ex store" although they were in lighters. A "store" is not the same thing as a "warehouse." The word "warehouse" is a well-known term, denoting a building on land in which goods may be placed; a "store," on the other hand, is a perfectly general term, denoting any place on land or water where goods are in fact stored.

Jowitt replied.

BAILHACHE J. stated the facts, and continued: I do not think that the defendants' letter of November 14 was

a contractual letter at all, nor do I think that the expression "ex store" contained therein did anything more than identify the transaction. The defendants, however, by their conduct seem to have recognized that the goods had to be in store in Rotterdam, and, treating the words "ex store" as forming part of the contract, the question is whether the goods, the subject of the sale, could be correctly described as in store when in fact they were in lighters. They were correctly described as "spot" goods. The expression "spot goods" means that the goods are at the particular place in a deliverable state, and they are none the less spot goods because custom house formalities have to be complied with before the purchasers can obtain delivery. The point turning on the meaning of "ex store" is a point of substance. It appears that large quantities of goods had been sent to Rotterdam in the hope that they could be forwarded to Germany, but owing to financial difficulties due to the fall of the mark and for other reasons, Germany did not take the goods to the extent anticipated; consequently there was a big glut of goods in Rotterdam, the warehouses were full, and large quantities of goods were known to be stored in lighters. These lighters are very large, capable of carrying as much as 1000 tons. There are advantages and disadvantages in storing goods in lighters; the advantages are that if the goods are to be removed out of the country by sea or rail it is much more convenient for them to be in lighters which can be brought alongside the steamer or the quayside rail; the disadvantages are, first, that the insurance upon goods stored in lighters is slightly heavier than when they are stored in a warehouse, and secondly, the cost of storage in lighters is heavier than storage in a warehouse. I am not, however, concerned with the question whether it is more or less advantageous to store goods in lighters, because if the storage in lighters is not in accordance with the contract, the fact that it may be advantageous to have them there is immaterial. That has been the law since *Bowes* v. *Shand*. (1) The question is: were these goods accurately described as being in

(1) (1877) 2 App. Cas. 455.

1920

FISHER, REEVES & Co. v. ARMOUR & Co.

Bailhache J.

store or could they properly be sold "ex store"? In substance, the plaintiffs' case is that "store" is equivalent to "warehouse," and that when the goods are sold "ex store" the word "store" conveys to the purchaser the idea that the goods are in fact in a warehouse. A witness was called to support this contention. No attempt was made to prove any customary trade meaning, and I have come to the conclusion that the contention is not correct. The word "warehouse" has a specific meaning; the word "store" on the other hand has no specific meaning but is a general term and may appropriately be used to describe any place in which goods are in fact for the time being stored. For example, if these goods had been on the quay and stored there, I think they might have been sold "ex store," although no one would say that a quay is a warehouse. In my judgment the goods stored in these lighters at Rotterdam were correctly described as in store and could properly be sold "ex store." The plaintiffs' point therefore fails.

[His Lordship then dealt with another point not material for the purposes of this report.]

Judgment for defendants.

Solicitors for plaintiffs: *Cosmo Cran & Co.*

Solicitors for defendants: *W. A. Crump & Son.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1920
Feb. 9, 17.

In re EDEN.

WATKINS *v.* EDEN.

[1918. E. 20.]

Practice—Solicitor—Charging Order—Bill of Costs—"Costs, charges, and expenses"—Counsel's Fees—Fees not paid before Delivery of Bill—Preparing Brief—Taxation—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*Solicitors Act,* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

For the purpose of taxation of a solicitor's bill under s. 28 of the Solicitors Act, 1860, "costs, charges, and expenses" may include fees to counsel which have not been paid before the delivery of the bill or the commencement of the taxation.

A lady was involved in litigation with certain moneylenders. Her son was finding the money for the costs thereof. The lady and her son were being advised by different solicitors. The son's solicitor prepared the brief in the litigation and the lady's solicitor perused and approved it. The litigation was settled, and the lady recovered certain property. Her solicitor then applied for a charging order on the property recovered for his costs, charges, and expenses, and obtained by consent an order that his bill of costs as then delivered should be taxed and an undertaking that the amount found due should be paid. The bill of costs contained (1.) a sum for counsel's fees which had not then been paid, and (2.) a sum for preparing the brief in the litigation. Upon taxation of the bill:—

Held, that the counsel's fees, which were paid during the taxation, should be allowed as costs, charges, and expenses, though not paid before the commencement of the taxation, but that the sum for preparing the brief should not be allowed.

Sadd v. *Griffin* [1908] 2 K. B. 510 distinguished.

Decision of A. T. Lawrence J. affirmed on the first point and reversed on the second.

APPEAL from an order of A. T. Lawrence J. in chambers on appeal from the decision of a taxing Master allowing certain items on taxation of a bill of costs.

Ladv Eden, one of the appellants, was involved in a number of actions in which she was either as plaintiff or defendant claiming relief and damages against various moneylenders. Sir Timothy Eden, the second appellant, who was the son of Lady Eden, was prepared to guarantee the costs of these

C. A. 1920

EDEN, *In re.* WATKINS *v.* EDEN.

proceedings, and it was arranged that in so doing he should have the advice of Messrs. Christopher & Son, who were Lady Eden's family solicitors. It was thought desirable that Lady Eden should be represented by another solicitor in the actions by or against the moneylenders, and accordingly Mr. H. Watkins, the respondent in this appeal, was retained to act as her solicitor in those proceedings. The retainer was in this form: "8 January, 1918. H. Watkins, Esq., 53, Haymarket. Dear Sir, I hereby retain you to act as my solicitor in any actions brought against me which Mr. F. G. Christopher of 5, Argyll Place, Regent Street, may instruct you to appear in. Any instructions given by Mr. Christopher to you will be with my authority, and you may treat the same as coming direct from myself." After this retainer was given an agreement was made by which Messrs. Christopher & Son were to receive from Mr. Watkins one third of his profit costs and give credit for the amount so received in their account with Sir T. Eden. Mr. F. G. Christopher, the third appellant, prepared a brief for counsel and handed it to Mr. Watkins who perused and approved it.

Most of the actions against the moneylenders were consolidated. They were afterwards settled upon the terms that the defendants should deliver up to the plaintiff certain jewellery, promissory notes, and other property which they held as security for the repayment of loans and should pay 2000*l.* for costs as between party and party.

On April 16, 1919, Mr. Watkins took out a summons headed: "In the matter of an action between Lady Sybil Eden, plaintiff, and George Miller and others, defendants, and the other actions consolidated therewith and in the matter of the Solicitors Act, 1860, Harry Watkins, applicant, and Lady Sybil Eden, Sir Timothy Calvert Eden, Bart., and F. G. Christopher, respondents," asking (1.) for a declaration that the applicant as the solicitor employed by the plaintiff in the prosecution of the above-mentioned actions was entitled to a charge upon (*a*) all the securities, jewellery, and other property recovered in the said actions and then in the possession of the respondents, and (*b*) upon the

sum of 2000*l.* paid by the defendants in the said actions to the respondents or some or one of them in respect of party and party costs for the taxed costs, charges, and expenses of the applicant of or in reference to the said actions as such solicitor as aforesaid; (2.) that it might be referred to the taxing Master to tax such costs as between solicitor and client; (3.) that the 2000*l.* should be applied in payment of such costs when taxed and, if and so far as there remained any balance due to the applicant, sufficient of the said jewellery and securities might be sold and the proceeds applied in payment of the balance. On April 17 Mr. Watkins delivered his signed bill of costs as Lady Eden's solicitor in her action against George Miller and others and the other actions consolidated therewith. At the request of Messrs. Christopher & Son the bill was delivered to them. It included as disbursements items of 107*l.* 16*s.* for counsel's fees which however had not been paid before the bill was delivered and 262*l.* 10*s.* and 14*l.* 5*s.* for instructions for brief and for drawing the same and proofs. It also contained charges for interviews with Mr. F. G. Christopher.

On May 16, 1919, an order was made on the summons by consent in the following terms: "In the Matter of the Solicitors Act, 1860, Harry Watkins, Applicant, and Lady Sybil Eden, Sir Timothy Eden, Bart., and F. G. Christopher, Respondents. Upon hearing counsel for the Applicant and Messrs. Christopher & Son for the Respondents and by consent and upon reading the joint affidavit of the Applicant and John Philip Kent Jones filed herein And the Respondents Sir Timothy Eden, Bart., and Mr. F. G. Christopher undertaking to pay the applicant the balance found due within fourteen days of their receiving the taxing Master's certificate. It is ordered that it be referred to the taxing Master to tax as between solicitor and client the Applicant's bills of costs in *Lady Sybil Eden* v. *George Miller and Others* and the other actions consolidated therewith and as already delivered and that no order be made except that the Respondents do pay the Applicant his costs of this application to be taxed if not agreed."

C. A. 1920

EDEN, *In re.* WATKINS *v.* EDEN.

When Mr. Watkins' bill came before the Master for taxation objection was taken (1.) to the item of 107*l.* 16*s.* fees to counsel, on the ground that these fees had not been paid at the date of the taxation. They were in fact paid during the taxation.

The answer of the taxing Master to this objection was as follows: "The order gives the solicitor a charge. *Sadd* v. *Griffin* (1) has no application. As under a charging order a mortgagee can bring into account and be allowed any sum which he was liable to pay before proceedings and has paid although not till after proceedings, I overrule this objection."

Objection was also taken to the items, 262*l.* 10*s.* and 14*l.* 5*s.* "instructions for brief, drawing same, and proofs," on the ground that the work had been done by Mr. Christopher and not by Mr. Watkins.

The answer of the taxing Master was as follows: "The only person who could give the client a discharge or who could take any action to recover the costs for work done was the solicitor. Any question between the solicitor and any other person cannot be disposed of in these proceedings, and so far as the client is concerned it is immaterial who drew the brief and the like. The solicitor was responsible, and any claim for negligence, should there have been any, could only be brought against him. In my view the above considerations apply to this case with added force from the fact that another solicitor did part of the work and was to receive a share of the profit costs and he may or may not have rights as between himself and the solicitor on the record."

Lady Eden, Sir Timothy Eden, and F. G. Christopher appealed to the judge in chambers to review the taxation and disallow the items objected to. A. T. Lawrence J., the judge in chambers, dismissed the appeal.

Lady Eden, Sir Timothy Eden, and F. G. Christopher appealed.

Schiller K.C. and *H. C. Marks* for the appellants. The taxing Master and the learned judge were wrong in allowing

(1) [1908] 2 K. B. 510.

the fees to counsel which had not been paid when the bill of costs was delivered. Sect. 28 of the Solicitors Act, 1860 (1), allows a charging order for those costs only which are recoverable by the solicitor. The recovery of costs as between solicitor and client is regulated by s. 37 of the Solicitors Act, 1843. That section provides that no solicitor shall commence or maintain any action for the recovery of any fees, charges, or disbursements . . . . until the expiration of one month after the solicitor shall have delivered to the party to be charged . . . . a bill of such fees,

(1) Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper. . . . ."

Sect. 36: "The first hereinbefore mentioned Act [i.e., the Solicitors Act, 1843] and this Act shall be construed together as one Act."

Rules of the Supreme Court, 1883, Order LXV., r. 27 (29A): "In taxations under or pursuant to the Solicitors Act, 1843, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing Master if they are actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client. . . . . Provided also that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings in discharge of any such antecedent liability so set out in the bill (including counsel's fees) may be allowed by the taxing Master if actually made before the commencement of the taxation, if it appears to him that such payments have been properly made and that no injustice is done thereby. . . . ."

C. A. 1920

EDEN, *In re.* WATKINS *v.* EDEN.

charges, and disbursements signed as therein directed. Then on application within a month by the party chargeable the bill must be referred to be taxed by the proper officer of the Court in which the reference is made and the Court shall restrain the solicitor from commencing any action pending the reference. If no application is made within the month by the party chargeable, the reference may be made upon the application either of the solicitor or the party chargeable, and the Court may restrain the solicitor from commencing proceedings pending the reference. "Disbursements" in this section include only payments actually made at the time of delivering the bill: *Sadd* v. *Griffin*. (1) The rigour of this rule was somewhat relaxed by Order LXV., r. 27 (29A), of the Rules of the Supreme Court, 1883: *In re Hildesheim* (2); but not so as to affect this case. Counsel's fees unpaid are not recoverable by a solicitor from his client: *In re Taylor & Co.* (3); nor are any costs unless included in a signed bill. Under s. 28 of the Act of 1860 the Court may order taxation of that bill. If it does, the taxation takes place under s. 37 of the Act of 1843. In such a taxation payments not made at the time of delivering the bill are not allowed: *Sadd* v. *Griffin*. (1) It follows that a charging order can only be made for payments actually made before delivery of the bill. The object of s. 28 of the Act of 1860 is stated by Lord Macnaghten in *North* v. *Stewart* (4); it had been decided in *Shaw* v. *Neale* (5) that a solicitor's lien for costs did not attach to real property recovered by his exertions; the section was intended to alter the law and to give the solicitor a lien on real as well as on personal property. It increased the solicitor's security but not the client's indebtedness.

As to the items for "instructions for brief and drawing the same and proofs," not having done the work the respondent cannot claim payment for it.

Barrington-Ward K.C. and *Alexander Cairns* for the

(1) [1908] 2 K. B. 510.
(2) [1914] 3 K. B. 841.
(3) [1891] 1 Ch. 590.
(4) (1890) 15 App. Cas. 452, 457.
(5) (1858) 6 H. L. C. 581.

respondent. Sect. 37 of the Solicitors Act, 1843, has nothing to do with this case. There is no question of waiting for a month, or bringing an action for the costs, or of reference by the Court to taxation on the application of the party chargeable or the solicitor. Sect. 28 of the Act of 1860 was a new enabling section allowing the Court to declare a solicitor entitled to a charge upon property recovered "for the taxed costs, charges, and expenses" of or in reference to the suit, matter, or proceeding in which the property is recovered. Special power is given to the Court to tax such costs, charges, and expenses. The taxation is under this Act and not under the Act of 1843. The question is whether "expenses" include counsel's fees paid after delivery of a bill of costs. Only an extremely technical reading of the section would exclude them.

As to the items for instructions for brief, a solicitor is not bound to prepare a brief and draw the proofs with his own hand. He may do it by his agent. He, as the solicitor on the record, is responsible for the work done, and remuneration should follow responsibility.

Schiller K.C. in reply.

[*Emden* v. *Carte* (1); *In re Park* (2); *Jackson* v. *Smith* (3) and Seton on Judgments, 7th ed. (1912), vol. ii., p. 1043, were also cited.]

Cur. adv. vult.

Feb. 12. The following written judgments were delivered.

BANKES L.J. This is an appeal from an order of a judge at chambers, affirming the decision of the taxing Master in reference to certain items in a bill of costs which had been allowed on taxation, and which the appellants contended should have been disallowed, either wholly or in part. It is necessary to set out the facts, as they are special and peculiar; and the decision of the Court proceeds upon those special facts.

In January, 1918, Lady Eden commenced a number of

(1) (1881) 19 Ch. D. 311. (2) (1889) 41 Ch. D. 326.
(3) (1884) 53 L. J. (Ch.) 972.

C. A. 1920

EDEN, *In re.* WATKINS *v.* EDEN.

Bankes L.J.

actions against moneylenders, claiming relief and damages. These actions were consolidated and were ultimately settled. Messrs. Christopher & Sons were Lady Eden's family solicitors; and they acted for Sir Timothy Eden, a son of Lady Eden, who was prepared to pay the costs of the proceedings taken by Lady Eden against the moneylenders. It was considered desirable that Lady Eden should not be represented by the same solicitor as her son; and consequently the respondent was retained by Lady Eden. The retainer was in a very special form, which has not hitherto, I think, had sufficient attention directed to it. I will refer to the precise terms later. After the settlement of the actions, the respondent, at the request of Messrs. Christopher & Son, made out and sent them his bill of costs against Lady Eden. He then took out a summons headed in Lady Eden's consolidated actions and "In the Matter of the Solicitors' Act, 1860, Harry Watkins, Applicant, and Lady Eden, Sir Timothy Eden, Bart., and F. G. Christopher, Respondents," asking for (1.) A charge upon certain property and moneys recovered in the actions then in the possession of the respondents for the taxed costs, charges, and expenses of the applicant of or in reference to the said actions, as Lady Eden's solicitor; (2.) A reference to the taxing Master to tax such costs as between solicitor and client; (3.) that the property charged might be applied in payment of such costs when taxed. It appears that it was desired to avoid making any order for a charge; and so by consent the order of May 16, 1919, was made. It was in the following terms: [The Lord Justice read the order of May 16, 1919, set out above, and proceeded:] The taxing Master has treated this order as a direction to him to tax the bill under the Solicitors Act, 1860. In this I think he was right. The order is so headed. And though, owing to the consent of Sir Timothy Eden and Mr. Christopher to give the undertaking, the order is not in the usual or appropriate form for an order under the Act of 1860, there is no indication anywhere that there was any intention to deprive the respondent of any benefit to which he was entitled under an order to tax under that Act.

Two main objections were taken to the bill as allowed by the Master. The first was, that he ought not to have allowed the counsel's fees set out in the objections, on the ground that they had not been paid before the delivery of the bill or before taxation. The second was, that under the circumstances, no sum should have been allowed for instructions for brief, or for drawing the same, and making copies, or alternatively, nothing like the sum allowed by the taxing Master. The first objection would clearly have been good had the taxation been a taxation under the Solicitors Act, 1843. Sect. 37 of that Act requires a solicitor, before suing for any fees, charges, or disbursements, to deliver a bill to the client of such fees, charges, and disbursements. In *Sadd* v. *Griffin* (1), it was decided that a counsel's fee which has not been paid is not a "disbursement," as that expression in the Solicitors Act, 1843, refers only to actual payments before delivery of the bill. An unpaid counsel's fee had, therefore, until the making in May, 1909, of sub-r. 29A of r. 27 of Order LXV., no place in a solicitor's bill as delivered to the client, under the Act of 1843. That rule made an alteration in the practice with regard to taxation under that Act; but it has no application to a taxation under the Solicitors Act, 1860. What, therefore, is the position of a solicitor with regard to an unpaid counsel's fee, when he has obtained an order to tax under the Act of 1860? He must, of course, produce counsel's signature as a voucher of payment, before the fee is allowed on taxation, as required by Order LXV., r. 27, sub-r. 52. Is he under any other obligation, either statutory or otherwise? I think not. The Act of 1860 does not contain the expression "disbursements." The words are "costs, charges, and expenses." The Act is intended as a protection to the solicitor; and the charge covers costs, charges, and expenses to be incurred, as well as those actually incurred at the date of the Order: *In re Hill* (2); *In re Meter Cabs, Ld.* (3) I think the Master took the right view of his duty under the order to tax; and that

(1) [1908] 2 K. B. 510. (2) (1886) 33 Ch. D. 266.
(3) [1911] 2 Ch. 557.

C. A. 1920

EDEN, *In re.* WATKINS *v.* EDEN.

Bankes L.J.

the appeal fails upon the objection to the allowance of counsel's fees.

The second objection stands upon a different footing. The respondent was quite aware of the special circumstances under which he was employed. He took a retainer in a special and unusual form. He made an agreement with Mr. Christopher, which is also in a special and unusual form. He knew that Sir Timothy Eden was paying Mr. Christopher for the work he did for him, and he knew that Mr. Christopher was crediting Sir Timothy Eden with one third of his, the respondent's, profit costs. The Master appears to have treated the case as one in which a solicitor and his agent are jointly engaged on work for the client, in which case it is immaterial that one of the two does more than his share of the work, or relieves the other of work which would usually be done by him. If the case had been one of that kind, I should have agreed with the view taken of it by the Master. In my opinion, however, the special terms of the retainer, given under the circumstances in which it was given, take the case out of that category. The special terms of the retainer are "Any instructions given by Mr. Christopher to you will be with my authority, and you may treat same as coming direct from myself." I think these terms of the retainer direct the respondent to look upon Mr. Christopher as the client, and to treat him as such. The form of the bill of costs indicates that the respondent so regarded it, as he charges for all his interviews and consultations with Mr. Christopher, which he would not be entitled to do if Mr. Christopher was his agent merely. The respondent is only entitled to make these charges on the assumption that under the special circumstances of the case he was to consider and treat Mr. Christopher as if he was the client herself. If Lady Eden herself had had the brief prepared, and had taken it to the respondent and asked him to deliver it to counsel after satisfying himself as to its correctness, would the respondent have been entitled to charge for instructions for brief on the footing that he had prepared the brief himself? I think not. It may be that this view of the position was not

brought to the attention of either the taxing Master or the judge. It is, however, insisted upon in this Court, and as the retainer is set out in the notice of objections and attention called to the special form in which it is drawn, I think that the point is open to the appellants, and that they are entitled to succeed upon it. The bill of costs must, therefore, be referred back to the Master for him to reconsider what the proper allowance should be, under the heading "Instructions for brief, drawing same and proof," upon the footing that what Mr. Christopher did in the preparation of the brief must be treated as having been done by Lady Eden herself. As the appeal has partly succeeded and partly failed, there will be no costs on either side of the appeal, or of the proceedings below.

SCRUTTON L.J. This is a peculiar case, turning on its own very special facts. Lady Eden was in the hands of money-lenders. Her son, Sir Timothy Eden, financed an action by Lady Eden to extricate her from their hands, being advised by Messrs. Christopher, the Eden family solicitors. Lady Eden was represented by Mr. Watkins, a solicitor, under the following retainer: "8th January, 1918, H. Watkins, Esq., 53, Haymarket. Dear Sir, I hereby retain you to act as my solicitor in any actions brought against me, which Mr. F. G. Christopher of 5, Argyll Place, Regent Street, may instruct you to appear in. Any instructions given by Mr. Christopher to you will be with my authority, and you may treat same as coming direct from myself." He was, therefore, bound to accept Mr. Christopher's instructions, and to treat him as the alter ego of his client. The action resulted in the recovery of at least 2000*l.* Mr. Watkins then proceeded under the Solicitors Act, 1860, to apply for a charging order on the 2000*l.* recovered for his taxed "costs, charges, and expenses." On the hearing of the summons, which was properly treated as issued under the Solicitors Act, 1860, Sir Timothy Eden and Mr. Christopher undertook to pay "the balance found due within fourteen days after receiving the taxing Master's certificate"; and

C. A.
1920
EDEN, *In re.*
WATKINS *v.* EDEN.
Scrutton L.J.

a consent order was made to tax the applicant's bill of costs "as already delivered," the order being still headed under the Act of 1860. The bill included certain disbursements for counsel's fees, which had not been paid before the bill was delivered, or before the taxation commenced, but which were paid before the Master's allocatur. The Master allowed these fees; but the persons liable to pay objected to the taxation on the ground that the decision in *Sadd* v. *Griffin* (1) prevented the Master from including them in the bill, as they had not been paid when the bill was delivered, or under Order LXV., r. 27, sub-r. 29A, before the commencement of taxation. In party and party taxation, it is enough that the fees are paid before the allocatur is granted; but in solicitor and client taxation of a delivered bill, as the liability depends on the delivery of a signed bill including disbursements a month previously to the claim, the bill cannot be altered after delivery by including disbursements paid after its delivery: *Sadd* v. *Griffin*. (1). The same rule would apply to a taxation of a delivered bill against a third party liable to pay under s. 38 of the Solicitors Act, 1843. But it would not apply to a taxation under the Act of 1860, which is to quantify the amount of costs, charges, and expenses for which a charge is given without an order for personal payment. Such a taxation is in the same position as a party and party taxation, where it is enough that the expenses are paid before the allocatur is given. If, then, the taxation in this case is under the Act of 1860, the objection to the taxation is not valid; if the taxation were under s. 38 of the Act of 1843, it would be. I think it would be unnecessarily harsh on the solicitor who properly proceeded under the Act of 1860 for a charging order, and who obtained by consent an order stated to be under the same Act, for a third party's liability and a taxation, to say that he really should have treated the matter as under the Act of 1843, and paid the fees a little earlier than he did; and that because of this irregularity in the consent order he is to be precluded from

(1) [1908] 2 K. B. 510.

recovering at all the fees that he has in fact paid. For these reasons, I think the appeal on this point fails.

The second point is this. After Mr. Watkins had received the retainer already read, by which Mr. Christopher was to be treated as the alter ego of his client, Mr. Christopher desiring to keep down the costs payable by the Eden family and being paid by Sir Timothy Eden for the work he did, made an agreement with Mr. Watkins that he, Mr. Christopher, should receive from Mr. Watkins one third agency fees, which he agreed with Sir Timothy Eden to credit to his account. Mr. Christopher prepared a brief, which he handed to Mr. Watkins to deliver. Mr. Watkins perused and approved and delivered it. He then included in his bill, besides a number of detailed charges for interviews with Mr. Christopher, recoverable on the basis that Mr. Christopher was his client and not his agent, a charge for instructions for brief based on the actual brief delivered without regard to whether the work was done by Mr. Christopher or himself. The Master allowed a fee for instructions for brief on this basis. The client objected to the allowance on the ground that it included a charge for work done, not by Mr. Watkins, but by the client herself or her representative, Mr. Christopher. The Master overruled the objection, stating "that it is immaterial as far as the client is concerned, who does the work"; and that any question between the two solicitors was provided for by the agency agreement. I think the Master proceeded on a wrong principle. When the client does part of the work to which the solicitor is asked to put his name, while the solicitor is entitled to peruse the work and has the right to approve or disapprove of his name being used in connection with it, he cannot, in my view, charge the client for the work done by the client, as if it had been done by the solicitor himself. This principle the Master has not followed; and the taxation must be remitted to him to revise his allowances on the basis that the solicitor is entitled to charge for perusing the brief suggested and delivered, and for any interviews with Mr. Christopher in connection therewith; but not for any work done by Mr. Christopher on the brief as the alter ego

C. A. 1920

EDEN, *In re.* WATKINS *v.* EDEN.

Scrutton L.J.

of the client under the retainer. As the appeal in part succeeds and in part fails, there should be no costs of the appeal here or below.

Appeal allowed in part.

Solicitors for appellants: *Christopher & Son.*

Solicitor for respondent: *H. Watkins.*

W. H. G.

C. A. 1920 *Jan.* 14, 15, 26.

[IN THE COURT OF APPEAL.]

DEY *v.* MAYO.

[1918. D. 1199.]

Gaming—Cheques given for Racing Bets—Indorsement in Blank—Banker receiving for Collection—"Indorsee" or "holder"—Gaming Act, 1835 (5 *& 6 Will.* 4, *c.* 41), *ss.* 1, 2.

By s. 1 of the Gaming Act, 1835, notes, bills, and mortgages, which were by certain Acts of Parliament declared to be void, including notes, bills, and mortgages given as security for money lost in bets on horse races, are to be deemed to be made, drawn, accepted, given, or executed for an illegal consideration.

By s. 2: "In case any person shall .... make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is" by the aforesaid Acts of Parliament "declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record":—

Held, by Bankes and Scrutton L.JJ., that the word "holder" of a note or bill in s. 2 does not include the person to whom the note or bill was originally given;

By Bankes L.J., that the word does not include one who, to the knowledge of the person actually paying, is a mere representative or agent of the person to whom the note or bill was originally given;

By Bankes, Scrutton and Atkin L.JJ., that it includes other persons

in lawful possession of the note or bill though they be not holders in due course, and therefore includes a banker who receives the note or bill for collection.

The loser of bets on horse races drew in favour of the winner cheques crossed "Account payee. Not negotiable." The winner indorsed the cheques in blank and paid them into an account with his bankers which was his own account though in his wife's name. The bankers credited the account with the amount of the cheques and then presented and obtained payment of them. In an action by the loser against the winner under s. 2 of the above Act to recover the amount of the cheques as having been paid to a holder,

Held, that the bankers were holders of the cheques, and that the plaintiff was entitled to recover.

Held, by Scrutton L.J., that the defendant's wife was also a holder.

Golding v. *Bradlaw* [1919] 2 K. B. 238 approved.

Lynn v. *Bell* (1876) Ir. R. 10 C. L. 487 discussed; *Nicholls* v. *Evans* [1914] 1 K. B. 118 disapproved in part.

Judgment of Avory J. reversed.

APPEAL from the judgment of Avory J. (1)

The action was brought by the plaintiff to recover 852*l.* 0*s.* 8*d.* which he had paid to the defendant in March, April and May, 1917, by five cheques drawn to the defendant or order and crossed "Account payee. Not negotiable." The sum represented the defendant's winnings on bets made by him with the plaintiff on horse races. The cheques were indorsed by the defendant in blank and paid by him personally into a banking account kept by him at the London and South Western Bank, Golders Green Branch, in the name of Stella Mayo, his wife. The cheques were duly honoured. In 1918 the plaintiff won from the defendant in bets a considerable sum which the defendant refused to pay. The plaintiff thereupon brought this action claiming that he was entitled to recover under s. 2 of the Gaming Act, 1835, (2) as money paid for and on account of the defendant the 852*l.* 0*s.* 8*d.* which he had paid in 1917.

At the trial the only point made by the plaintiff was that the defendant's wife was an "indorsee" or "holder" of the cheques within the meaning of the section.

The bank manager, who was called as a witness for the

(1) [1919] 2 K. B. 622.

(2) The material words of the section are set out in the headnote.

C. A. 1920

DEY v. MAYO.

plaintiff, gave the following evidence, according to the shorthand note taken at the time :—

" Q. : In presenting these cheques did you present them on behalf of Stella Mayo, the customer of your Bank, to whose account they were paid in ?

" A. : I think I can only answer that question by saying these cheques were put to the credit of Stella Mayo.

" Avory J. They were put to the credit of Stella Mayo—that is right, is it not ?

" A. : Yes.

" Mr. Cannot (counsel for the plaintiff) : You have credited Stella Mayo with the money you received ?

" A. : Well, we credited the account when the cheque was paid in. Our practice now is to facilitate the whole matter when we take the cheques we credit the account at once and collect.

" Avory J. : You credit it when it is paid in and if it is returned you debit it ?

" A. : Yes."

The learned judge held that the banking account, though in the name of Stella Mayo, was the account of the defendant ; and that Stella Mayo, having no title distinct from the defendant, the original payee, was not an indorsee or holder. He therefore gave judgment for the defendant.

The plaintiff appealed.

Beyfus (*Cannot* with him) for the appellant. The learned judge was wrong in holding that Stella Mayo was not an " indorsee " or " holder " within the meaning of s. 2 of the Gaming Act, 1835. But, assuming he was right, the evidence of the bank manager shows that the bankers were " holders in due course " of the cheques within the meaning of the Bills of Exchange Act, 1882, s. 29 : *Capital and Counties Bank* v. *Gordon*. (1) At the least they were " holders " of the cheques within the meaning of s. 2 of that Act. " Holder does not necessarily mean a holder for value. The expression includes every person who is in lawful

(1) [1903] A. C. 240.

possession of the instrument, and therefore includes an agent for collection" : *Akrokerri (Atlantic) Mines* v. *Economic Bank* (1), per Bigham J. A holder within the Bills of Exchange Act, 1882, is a holder within s. 2 of the Gaming Act, 1835. This becomes clear when the object of the Gaming Act, 1835, is considered. The object was to relieve the bona fide holder or assignee of a note, bill, or mortgage without helping the original payee or mortgagee.

[SCRUTTON L.J. The original payee might be a holder within the Bills of Exchange Act, but he is not a holder within s. 2 of the Gaming Act, 1835 : *Nicholls* v. *Evans*. (2) Would "holder" include a person known to be the servant of the original payee, or his bare agent to receive payment ?]

Any one who actually receives payment from the drawer of a cheque is a "holder" within the section : *Lynn* v. *Bell*. (3) The word includes others than bona fide holders for value ; it includes one who takes the cheque knowing it was originally given for a betting debt : *Golding* v. *Bradlaw*. (4) The bankers in this case could have sued the appellant on the cheques, even though they would hold the proceeds when recovered as bankers for the respondent. The appellant would have had no defence to such an action. It follows that the bankers are holders of the cheques and that the appellant having paid the bankers has a right to recover the amount from the respondent as money paid on his account.

J. B. Matthews K.C. and *Martin O'Connor* for the respondent. As to the first point, there was ample evidence to support the finding of the learned judge that the banking account was the respondent's account, although it was in the name of his wife.

As to the second point, that the bankers were holders of the cheques within the meaning of s. 2 of the Gaming Act, 1835, this argument ought not to be heard : *Banbury* v. *Bank of Montreal*. (5) It was not suggested in the Court below. If it had been raised, evidence might have been

(1) [1904] 2 K. B. 465, 472.
(2) [1914] 1 K. B. 118.
(3) Ir. R. 10 C. L. 487.
(4) [1919] 2 K. B. 238.
(5) [1918] A. C. 626, 705, 714.

C. A. 1920

DEY v. MAYO.

adduced by the respondent to show the state of his banking account. If a customer's account is in credit, drafts paid into the bank even though credited to the account may be recovered in specie by the customer if the bankers become bankrupt: *Giles* v. *Perkins* (1); *Thompson* v. *Giles* (2), the inference being that the bankers are then acting as mere agents for collection: *Gaden* v. *Newfoundland Savings Bank.* (3) The credit of the drawer of the cheques might also be matter of importance. The character in which a banker receives payment of a cheque is a question of fact: *M'Lean* v. *Clydesdale Banking Co.* (4); *Capital and Counties Bank* v. *Gordon.* (5) If the bankers took the cheques as mere agents for collection they would not be holders of the cheques within the meaning of s. 2 of the Act of 1835: *Nicholls* v. *Evans.* (6) The fact that they credit a customer's account in their books with the amount of a cheque they receive is equivocal; if the cheque is not met, they debit the account. They could not do this if they took the cheque themselves.

A "holder" within s. 2 of the Act of 1835 is one who can enforce payment against the drawer; one towards whom "the person giving the security" is "subjected to liability": *Lynn* v. *Bell* (7), per Palles C.B., or "a person with a distinct title from the original payee just as an indorsee or an assignee clearly has a distinct title": *Nicholls* v. *Evans* (8), per Channell J. A mere agent for collection, who is the alter ego of the person to whom the note, bill, or cheque was originally given is not a holder within the statute.

Beyfus in reply. Any person in lawful possession of the note, bill or cheque, if it is payable to bearer, is the holder of it. It matters not whether he is merely an agent for collection. The original drawer or maker of the cheque or note cannot know, and was not meant to discover, in what character the other demands payment.

Cur. adv. vult.

(1) (1807) 9 East, 12.
(2) (1824) 2 B. & C. 422.
(3) [1899] A. C. 281; but see *Ex parte Richdale* (1882) 19 Ch. D. 409.
(4) (1883) 9 App. Cas. 95.
(5) [1903] A. C. 240.
(6) [1914] 1 K. B. 118.
(7) Ir. R. 10 C. L. 487, 493.
(8) [1914] 1 K. B. 118, 120.

Jan. 26. The following written judgments were delivered.

BANKES L.J. This is an appeal from a judgment of Avory J. The action is one by the appellant, a bookmaker, to recover back from the respondent the sum of 852*l.* 0*s.* 8*d.* which the appellant had paid to the respondent by five cheques in March, April and May, 1917. The sum paid represented the respondent's winnings on bets made by him with the appellant on horse races. In June, 1918, the respondent lost a considerable sum to the appellant in bets, which he failed to pay, and thereupon the appellant sought to take advantage of s. 2 of the Gaming Act, 1835, which provides as follows: [The Lord Justice read s. 2 of the Act, and proceeded:] The five cheques in question were all drawn in favour of the respondent, crossed and indorsed "Account payee. Not negotiable." They were indorsed by the respondent in blank and were paid by him personally into an account standing in his wife's name at the London and South Western Bank, Ld., Golders Green Branch. At the trial before Avory J. the only point made by the appellant was that the respondent's wife was either the "indorsee" or the "holder" of the cheques within the meaning of s. 2 of the statute. The contest between the parties in the Court below was confined to the question whether the account at the bank was really the husband's or the wife's account. The learned judge upon the evidence decided that it was the husband's account. Upon the evidence I do not see that any other conclusion was possible. The learned judge was apparently ready to assume that the respondent's wife was in a sense both a holder and an indorsee of the cheques. I doubt whether there is any evidence to support this view, and had the case presented to this Court been the same as that presented in the Court below, I should have had no hesitation in holding that the decision arrived at by the learned judge was the correct one.

Mr. Beyfus, however, who argued the case for the appellant at very short notice in the absence of the counsel who conducted the case in the Court below, took a point which he developed in an excellent argument. His main point was

C A. 1920

DEY v. MAYO.

Bankes L.J.

that the really material question was not what was the position of the respondent's wife, but what was the position of the bankers who collected the cheques? The argument in support of this contention was divided under two heads: first, that upon the evidence the bankers were holders in due course of the cheques, and therefore entitled to collect them in their own right; secondly, that, even if they were not so entitled, the bankers were obviously holders of the cheques and as such within the language of the statute. Mr. Matthews for the respondent submitted that neither point was open to the appellant in this Court, as it had not been taken or indicated in the Court below. This renders it necessary to consider what the rule is in such a case. It has often been referred to both in this Court and in the House of Lords. In the recent case of *Banbury* v. *Bank of Montreal* (1) Lord Parker put the matter thus: "There are, no doubt," he says, "cases in which the Court of Appeal have refused to allow points of law not taken in the Court of first instance to be raised on appeal. But these cases do not go to jurisdiction, but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal." In the same case (2) Lord Finlay L.C. in dealing with the same point and in reference to an alleged admission made during the trial of that action, says: "But in truth the conduct of a case speaks as clearly as words." Mr. Beyfus, in support of his first contention, relies on two answers given by the bank manager in answer to questions put by the appellant's counsel, who, as I have already pointed out, were endeavouring to show that the respondent's wife was either holder or indorsee of the cheques. The passage relied on comes at the end of the bank manager's evidence. It is as follows. [The Lord Justice read the passage set out above and continued:] It is obvious from the form of the question that the appellant's counsel had

(1) [1918] A. C. 626, 705. (2) Ibid. 659.

in his mind the position of the bank after it had received payment of the cheques. The bank manager's answer opened the opportunity of raising the case Mr. Beyfus now seeks to raise, but the opportunity was not taken advantage of. No one attached any importance to the answer; the learned judge made no note of it, and the point now argued by Mr. Beyfus was obviously no part of the appellant's case in the Court below.

As was pointed out in the case of *M'Lean* v. *Clydesdale Banking Co.* (1) and by Lord Macnaghten in *Capital and Counties Bank* v. *Gordon* (2), the character in which a bank receives payment of a cheque is a question of fact. There is no doubt that a bank which credits the customer with the amount of a cheque as soon as it is paid in to his credit is usually in the position of a holder in due course of the cheque, and collects the same, not for the customer, but for itself. As Mr. Matthews points out, it does not necessarily follow that, because a bank adopts the usual practice of crediting a customer's account in this way, it would allow the customer to draw against his credit balance to the extent of the amount credited, until the cheque was cleared; there must be many cases where, for convenience of book-keeping, banks follow the usual practice with regard to immediately crediting the customer's account with the amounts of cheques paid to the account, and yet have an arrangement with the customer that he is not to draw against the amount credited until the cheque is paid. In any such case, the credit entry is a mere book entry, and the bank may be mere agents for collection of the cheque. I think the present case is one in which, had the point been taken in the Court below, an investigation into the arrangement between the bank and the respondent was very necessary. The respondent was an undischarged bankrupt; his account had been opened in his wife's name for that reason; he was apparently indulging freely in betting transactions, and it seems not unlikely therefore that the bank in his case would not have allowed him to draw against the cheques in

(1) 9 App. Cas. 95. (2) [1903] A. C. 240, 244.

C. A. 1920

DEY v. MAYO.

Bankes L.J.

question until they were cleared. In the exercise of its discretion therefore, I do not think that this Court ought to allow the appellant to take a point in this Court for the first time based upon a chance answer of a witness in the Court below which does not necessarily bear the interpretation sought to be put upon it, and which, had the point been taken in the Court below, would certainly have challenged an investigation which did not in fact take place. For these reasons, I do not think that the point is open to the appellant to contend that the bankers to whom the cheques were paid were themselves holders of the cheques in due course. It is not therefore necessary to say anything further upon this point, except that I cannot share the doubt expressed by Channell J. in *Nicholls* v. *Evans* (1) as to whether, when payment is made to bankers in the character of holders in their own right, the case is one which falls within the statute.

Mr. Matthews' objection, however, cannot prevail in reference to Mr. Beyfus' second point. The bankers who collected and received payment of these cheques were unquestionably holders of the cheques, if the same meaning is to be given to the expression "holder" in s. 2 of the Gaming Act, 1835, as it bears in the Bills of Exchange Act, 1882. As was pointed out by Bigham J. in *Akrokerri (Atlantic) Mines* v. *Economic Bank* (2) the expression "holders" in the latter Act includes every person who is in lawful possession of the instrument. No evidence therefore which could have been given at the trial and no opportunity of further investigating the facts could possibly alter the position which was established at the trial—namely, that the bankers were holders of these cheques, though not necessarily holders in due course. It becomes necessary therefore to consider what meaning is to be placed upon the expression "holder" as used in s. 2 of the Gaming Act, 1835, and incidentally to consider whether the cases of *Nicholls* v. *Evans* (1) and *Golding* v. *Bradlaw* (3) were correctly decided

(1) [1914] 1 K. B. 118. (2) [1904] 2 K. B. 465, 472.
(3) [1919] 2 K. B. 238.

and whether the dictum of Palles C.B. in *Lynn* v. *Bell* (1) is well founded.

It is I think convenient to consider separately (1.) the object of the Gaming Act, 1835; (2.) the means by which that object is carried out; and (3.) the consequential provisions introduced by the statute to regulate the relations between the persons by whom and to whom respectively the securities and instruments referred to in the statute are made or given. The object of the statute is made plain by the preamble. It was to remove the hardship and injustice to persons who for valuable consideration and without notice of the original consideration, had had indorsed, transferred, or assigned to them securities or instruments which, because of the original consideration for them, had been declared by earlier statutes to be void, and which therefore, even in the hands of bona fide holders or transferees of the same for value and without notice, were valueless. The remedy introduced by s. 1 of the statute is the provision that in the case of notes, bills, or mortgages declared by the earlier statutes to be void, these for the future should be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration. This section deals with the position as between the person seeking to enforce the note, bill, or mortgage, and the person against whom it is sought to be enforced. The section leaves the latter in full possession of all the rights he may have as against anyone seeking to enforce a note, bill, or mortgage given for an illegal consideration. For instance, in *Golding* v. *Bradlaw* (2), if the plaintiff in that action had refused to pay the cheques, and Mr. Lee had brought an action on them, the plaintiff must have succeeded, as Lee was not a holder of the cheques in due course within the meaning of the Bills of Exchange Act, 1882. Sect. 2 of the Gaming Act, 1835, was consequential upon the change in the law introduced by s. 1. Sect. 2 deals only with the position as between the original parties to the transaction, and that only after the person who made, drew, gave, or executed the note, bill, or mortgage, has paid the

(1) Ir. R. 10 C. L. 487. (2) [1919] 2 K.B., 238.

C. A. 1920

DEY v. MAYO.

Bankes L.J.

amount of money thereby secured. The obvious intention of the section was to provide that the person who drew, gave, or executed the note, bill, or mortgage, should be in no worse position, and that the person to whom the note, bill, or mortgage was given should be in no better position, because of the alteration in the law made by s. 1. I think also that it may be safely said that there was no intention to make any alteration in the rule of law which provides that a person who pays money to another with full knowledge of the facts cannot recover it back.

It seems plain from these considerations that when the statute speaks of a payment to an indorsee, holder, or assignee it must be referring to a payment to some person other than the person to whom the note, bill, or mortgage was originally given. A person who to the knowledge of the person making the payment is a mere representative or agent of the person to whom the note, bill, or mortgage was originally given to collect the amount thereof, cannot, I think, be regarded for the purpose of the section in any other light than as the person himself. I come therefore to the conclusion that a person who seeks to recover money under this section, as money paid for and on account of the person to whom a note, bill, or mortgage was originally given, must prove that he paid some person other than the last-mentioned person, and other than a person whom he knows to be a mere servant or agent of that person to collect the money.

No difficulty can arise where the person seeking to recover money under this section has paid the money to a person to whom he was legally compellable to pay it. The difficulty does arise where the person seeking to recover the money has paid it to a person other than the person to whom the note, bill, or mortgage was originally given, or to a person not known to the person making the payment to be his mere representative or agent to collect the money, but who is, in fact, his mere representative or agent, or a person who has in fact no better title than the person to whom the note, bill, or mortgage was originally given.

The Act of 58 Geo. 3, c. 93, which is recited in the Gaming

Act, 1835, specially confines the relief granted by that Act to indorsees for value without notice. No such limitation is to be found in s. 2 of the Act of 1835. In my opinion the fact that no attempt is made in the section to limit the expressions "indorsee" and "holder," and the fact that the assignee of a mortgage is treated exactly in the same way as the indorsee or holder of a note or bill, point strongly to the conclusion that the Legislature intended the expressions "indorsee" and "holder" to be construed in their widest and most general sense. I cannot see that any limitation can be placed upon the expressions except that which I have already indicated—namely, that the words cannot include the person to whom the bill or note was originally given or a person who, to the knowledge of the person making the payment, is a mere representative or agent of his to collect the money. Applying this view of the section to the present case, it follows that the bankers were holders of the cheques within the meaning of the section when payment was made to them. The appellant could not have known anything of the position of the bankers, as the cheques were presented to and paid by his bank in the usual course.

It remains now only to consider how far the reported decisions are in accordance with this view of the statute. The case of *Golding* v. *Bradlaw* (1) is quite in accordance with it. On the other hand, the dictum of Palles C.B. in the case of *Lynn* v. *Bell* (2), if it means what I think it means—namely, that payment to bring a case within the statute is payment which a person was compellable to make—is not in accordance with it. I agree with the decision in *Nicholls* v. *Evans* (3) in so far as the decision is that the holder must be some person other than the person to whom the cheque was originally given; but I am unable to agree with so much of the judgment as decides that the plaintiff in that case was not entitled to succeed because the cheques were paid to bankers who happened to be (though they were not known to be) mere agents for collection.

(1) [1919] 2 K. B. 238. (2) Ir. R. 10 C. L. 487, 493.
(3) [1914] 1 K. B. 118.

C. A. 1920

DEY v. MAYO.

Bankes L.J.

In my opinion it is a reasonable and natural inference from the language used in s. 2 of the statute that, if the maker of a bill or note finds himself, in consequence of the alteration in the law, faced with a demand to pay the amount thereof by some person who appears to him to be the holder or indorsee and not the person to whom he originally gave the bill or note, or his representative, he should be entitled to pay the same and claim the return of the amount so paid from the person to whom the note or cheque was originally given.

In my opinion the appeal succeeds. The judgment must be set aside and judgment entered for the plaintiff for the amount claimed, with costs of the action and of the appeal.

SCRUTTON L.J. Mr. Dey was a bookmaker. Mr. Mayo made bets with him, and was fortunate enough to win 852*l.* which he received by crossed cheques from Mr. Dey. Mr. Mayo was apparently in financial difficulties and thought it right and convenient to have only one banking account, which was in his wife's name, and on which she alone could draw cheques. He therefore indorsed the cheques for 852*l.* in blank and paid them into the account standing in the name of his wife. The bank in fact credited the account with them at once, and presented them for payment to Mr. Dey's bank, who paid them. Fortune changed, and Mr. Mayo instead of winning, lost bets amounting to 320*l.* odd. We are not told why, but it then seemed right to Mr. Mayo not to pay his losses, though Tattersall's Committee thought he should do so. This not unnaturally annoyed Mr. Dey. He sued Mr. Mayo for the 320*l.* to which claim the Gaming Act, 1845, was pleaded. But he was also advised that the resources of legal civilization were not exhausted and he sued Mr. Mayo for the 852*l.* under s. 2 of the Gaming Act, 1835, alleging that he, Dey, had paid the amount of cheques given for an illegal consideration to third parties—namely, Mrs. Mayo and her bank—to whom Mr. Mayo had indorsed them, and that he, Dey, was therefore entitled to recover that sum from Mayo as money paid for and on account of Mayo.

Avory J. found as a fact that the account in the name of Mrs. Mayo was the account of her husband, whose agent she was, and then held that neither the wife nor her bank was an indorsee or holder within the meaning of the statute.

There is a minor point, only important in this case, whether the bank, having credited the account at once with the cheques, did not present the cheques for payment for themselves and not for the customer, and whether the plaintiff, having regard to the course of the trial, is entitled to raise this point now. I deal with this matter later and consider first the question of general importance, the true construction of the statute.

At the time the Act was passed, bills and cheques for gaming debts were absolutely void, and a bona fide holder of such a cheque might find himself without any remedy through a matter of which he was quite ignorant and innocent. A case of this kind just before the passing of the Act was *Shillito* v. *Theed.* (1) The preamble of the Act recites this matter as a grievance requiring a remedy; it says: "And whereas securities and instruments made void by virtue of"—the earlier Acts—"are sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice; For remedy thereof be it enacted"—the remedy provided is given in s. 1 of the Act, and is that, instead of the bill or cheque being void, it shall be deemed to be given for an illegal consideration; and the effect of this again is that, if the indorsee or holder knew of the illegal consideration, he could not recover; if he did not know, but was a holder in due course, he could. But this did not exhaust the matter; for when the drawer was legally made to pay a gaming debt which he could before the statute have avoided paying, his position as regards the payee of the cheque was made worse, and it was therefore

(1) (1831) 7 Bing. 405.

C. A. 1920

DEY v. MAYO.

Scrutton L.J.

provided that, if he should "actually pay" an indorsee or holder, he could recover the sum paid from the payee of the cheque as money paid for or on account of that payee. In other words, while the statute protected the bona fide holder, it was not intended to improve the position of the gambling payee, by giving him an easy way of recovering a gaming debt. It must be further borne in mind that while, if the drawer paid to the payee of the cheque a sum which he knew was a gaming debt, there was no reason why he should be allowed to recover his voluntary payment, yet when he was asked to pay a third person, it might not be within his knowledge whether he had a defence because the claimant knew of the alleged consideration, or had no defence because the claimant was a holder in due course; and it was the payee of the cheque who put him in this difficulty by delivering the cheque to a third person to present. It might, therefore, be quite reasonable to allow the drawer, if he actually paid to such a person, to recover the sum paid from the payee of the cheque. It is true that a particular grievance is specified in the preamble, but legislative remedies sometimes exceed the grievance causing the legislation, and where the enacting words are clear, they cannot be limited by the preamble, though the preamble may be used to indicate the meaning if the enactment is ambiguous. When the Legislature, having provided a remedy in s. 1 for the grievance of the bona fide holder, deals in s. 2 with the resulting relations of the drawer and payee of a cheque, is any limitation to be put on the general words "actually pay to any indorsee or holder"?

First of all, can these words be limited to indorsees or holders whom the drawer is obliged to pay; that is, to holders in due course, the persons mentioned in the preamble? Bray J. had this question before him in the case of *Golding* v. *Bradlaw* (1), where the payee of cheques given for gambling debts indorsed them to his partner who gave cash for them, but knew that they were cheques for bets, and was therefore not a holder in due course. Bray J. held that the section

(1) [1919] 2 K. B. 238.

was not limited to holders in due course, but applied to "any indorsee or holder," and that the reason was that the drawer might not know whether the person presenting the cheque was a holder in due course or not. I agree with this judgment and the reasons for it. Palles C.B. in *Lynn* v. *Bell* (1) had to consider the point whether a cheque was a bill within the Act of 1835, and held that it was. He also held that a payment by the drawer's bank was a payment by the drawer; and then went on to say (2): "Prima facie, therefore, the right of the person giving the security, to recover from the person to whom such security was given, ought to extend to every case in which, by operation of the statute, the person giving the security was subjected to liability to the indorsee. The words of the statute carry out this object. To entitle the person who has given the security to recover, no more is required than that he should actually pay to an indorsee or holder. He pays when his banker pays on his account." The two sentences are apparently inconsistent, one speaking of liability to pay, the other of actual payment; and the paragraph ends up "he pays when his banker pays on his account," which is not the question in this case. While I should pay the greatest attention to any considered judgment of Palles C.B. the point was not argued before him, and I cannot treat these sentences as a considered judgment. If they were, and required the holder to be a holder in due course, I prefer the judgment of Bray J.

Next is the payee himself included in the term "holder"? (he clearly is not an indorsee). I agree with the view of Channell J. in the case of *Nicholls* v. *Evans* (3) that the section distinguishes between the original payee and persons whose title to sue on the note is derived from the original payee, but that very learned judge goes further and requires that the indorsee or holder should have a distinct, and apparently adverse title; he therefore holds that bankers receiving a cheque indorsed in blank for collection are not holders, and even treats it as doubtful whether, if the account

(1) Ir. R. 10 C. L. 487. (2) Ibid. 493.
(3) [1914] 1 K. B. 118.

C. A. 1920

DEY v. MAYO.

Scrutton L.J.

was overdrawn, or the bankers had given credit for the cheque before collection, they would be "holders." But the drawer and his bankers do not know the relation of the holder or indorsee in blank and his indorser, or the state of the banking account, or, as in this case, whether the account of the wife is the account of the husband. In such a case, applying the judgment of Bray J. in the case cited, I do not see my way to limit the words "any indorsee" or "holder" any further than by excluding the original payee. If the account in the wife's name is the account of the husband, she receives the cheque indorsed in blank as his agent, and becomes the "holder" of it. So does the bank receiving it for collection. Though neither of them is holder in due course, each of them, in my view, is a "holder," and can, under s. 38 of the Bills of Exchange Act, 1882, sue in his own name, as indorsee in blank, and therefore bearer and holder. I agree with the view of Bigham J. in *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* (1), that "holder" includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection. If the bank or Stella Mayo had sued Dey as holders of the cheque, he would be put in the difficulty pointed out by Bray J. of ascertaining whether or not he had a legal defence against them.

For these reasons I do not see my way to put any limitations on the general words "any indorsee" or "holder" except the words "not being the payee," and in particular I hold them to include an agent of the payee who has had conferred on him by indorsement in blank and delivery a title to sue on the cheque as holder, though he has given no value for the cheque and is not a holder in due course. The facts in this case do not raise any question of the effect of knowledge by the drawer that the holder is a bare agent of the payee, and I do not finally express any opinion on this point.

This view is enough to justify the allowance of the appeal and entry of judgment for the plaintiff for the amount claimed. There might be another ground for this, as the judge below

(1) [1904] 2 K. B. 465, 472.

elicited the fact that the bank credited the cheque to the account on payment in and did not wait till collection, and might therefore be holders in due course, collecting for themselves, and clearly within the statute. But neither counsel below appreciated the significance of this, or made any point of it to the judge, who accordingly did not deal with this aspect of the facts, or, indeed, make a note of it. As, if the point had been raised at the trial, further evidence might have been available, I am inclined to think, on the principle stated by the majority of the Law Lords in *Banbury* v. *Bank of Montreal* (1), especially by Lord Parker (2) and Lord Wrenbury (3), we ought not to allow the point to be taken now. If taken, it would have the same effect as that resulting from the view I have taken of the construction of the statute, and it is therefore unnecessary to express a final opinion on the point.

ATKIN L.J. I agree with the reasoning of the judgments that have just been read, and of the judgment of Bray J. in *Golding* v. *Bradlaw* (4); but as we are differing from the judgment of the learned judge below, though on a point that was not adequately put before him, I add a few words. In order to construe the Gaming Act, 1835, it is necessary to bear in mind the state of the law at the time the Act was passed. Not only were all securities for money lost at unlawful games void, but the stringent penal provisions of 16 Car. 2 and of 9 Ann, c. 14, were still in force. By s. 3 of the former Act, any person who lost more than 100*l.* by unlawful gaming, and did not pay the same at the time of loss, was relieved from any liability to pay, and any security for the same was avoided, while the winner was to forfeit treble the value of the sums won above 100*l.*, a moiety going to the Crown, the other moiety to such person as should sue for the same within one year after the date of the offence. There is nothing to suggest that the person suing might not be the original loser.

(1) [1918] A. C. 626.
(2) Ibid. 705.
(3) Ibid. 714.
(4) [1919] 2 K. B. 238.

C. A. 1920

DEY v. MAYO.

Atkin L.J.

By s. 2 of 9 Ann, c. 14, the loser of 10*l.* or more at unlawful games who had paid the winner might within three months "then next" recover the amount so lost and paid from the winner by action of debt; and if the loser did not so sue, any other person might sue and recover treble the value of the sum lost, one moiety for himself, the other moiety for the poor of the parish where the offence was committed. Whether the period of three months ran from the date of the loss or from the date of payment is not clear, but it would seem tolerably plain that if the loser within three months from the loss paid the winner upon any security given in consideration of the loss, he could recover back the sum so paid. Apart from these considerations every security was void, so that the loser had not to form any judgment as to whether any gaming security given by him was presented by a holder in due course; he could simply refuse to honour any such security, by whomsoever presented.

In these circumstances, what was the change made in the law by the Act of 1835? It appears to me that s. 1 is directed to the relief of holders in due course. Sect. 2 is directed to making it clear that neither the loser should be worse off nor the winner better off by reason of the protection to innocent holders given by s. 1. The loser, as before, was not put to inquire and decide whether a bill was presented by a person who was in fact a holder in due course. If he paid to any holder he was to have the right of recovery against the winner to whom he had given the bill. I think that this view alone gives full effect to the words: "any indorsee, holder or assignee"; and that it is in accordance with the intention of the Legislature. If it were otherwise, it is plain that it admits of collusion between the winner and the third party, who might feign a valuable consideration for the purpose of obtaining payment from the loser, but might be in a different mood when the loser required his evidence to support a claim against the winner. I think that the right already mentioned at that time subsisting in the loser to sue the winner for money actually paid to him, together with the actual words of s. 2, is probably sufficient to indicate that

C. A. 1920

DEY v. MAYO.

Atkin L.J.

"holder" does not include the winner himself; but, in view of the previous legislation, there seems to me no inherent improbability in a right of suit being given to the loser where he has paid the winner himself upon a note or bill, and I should prefer to reserve the point.

In the view the Court has taken of the statute it becomes unnecessary to decide whether the bank in this case were holders in due course, or whether in our discretion we should allow the plaintiff in the circumstances to raise the point before us, and I say nothing on the subject. I am clearly of opinion that the bankers in this case were holders of the cheques, and that payment to them entitled the plaintiff to recover the amount claimed from the defendant.

It is unnecessary to consider whether the position of the loser is affected if he pays to a person whom he knows to be presenting the security as agent for the winner, for there is no evidence of that fact in this case.

Appeal allowed.

Solicitors for appellant: *Percy Bono & Co.*
Solicitors for respondent: *Edmond O'Connor & Co.*

W. H. G.

C. A.

1920

Feb. 24, 25.

[IN THE COURT OF APPEAL.]

In re An Arbitration Between CALF AND THE SUN INSURANCE OFFICE.

Insurance—Burglary and Housebreaking—Loss by Theft—"Actual forcible and violent entry"—Business Premises—Breaking into Room therein—Entering Room by sliding back Lock with Instrument.

A policy of insurance, taken out with an insurance company by a tailor carrying on business at 58 Maddox Street, London, and headed "Burglary and Housebreaking Policy (Business Premises only)," provided that if at any time during the currency of the policy "the property or any part thereof described and included . . . . in the schedule hereto whilst contained within the premises (which expression shall not include any garden or outbuilding or other appurtenances) occupied by the insured and situate at the address mentioned in the said schedule shall be stolen by theft following upon an actual forcible and violent entry of the said premises by the person or persons committing such theft," then the company would pay the loss. In the schedule the premises were described as "Shop situate 58 Maddox Street, London, W.," and the property was described as "stock-in-trade as a tailor." The business premises of the assured at 58 Maddox Street, consisted of a shop on the ground floor, a fitting room on the first floor, and a trimming room in the basement. These three rooms were admittedly covered by the expression "shop" in the schedule. The upper floors were occupied partly by the assured and his family as a residence and partly by tenants of the assured. During the currency of the policy a person in the daytime entered the house in the normal way without any force or violence, and concealed himself in a coal cellar in the basement. At night, after the shop and trimming room had been locked up, he left the coal cellar and entered the trimming room from the passage, having by means of an instrument slid back the catch of the lock and so opened the door. He took a quantity of goods from the room and went up the stairs with the goods to the shop, which he entered by violently breaking open the door leading into the shop, and having taken more goods from the shop he left the house, with all the goods he had taken, by the front door. The insurance company denied liability on the ground that there had been no actual forcible and violent entry of the premises. In an arbitration the arbitrator came to the conclusion that the thief had entered the premises when he had without any force or violence secreted himself in the cellar, and that it was not material to consider the nature of his subsequent entry into the trimming room and shop; but that, if material, the entry into the trimming room was not an actual forcible and violent entry, whereas the entry into the shop was. He accordingly made an award in favour of the insurance company:—

Held, that the premises referred to in the policy meant the premises used by the assured as business premises only—namely, the shop, the

trimming room, and the fitting room, and that, the thief having made an actual forcible and violent entry into the shop and removed the goods therefrom, the company were liable.

Though not necessary to decide it, there was an actual forcible and violent entry into the trimming room.

Per Atkin L.J., Younger L.J. concurring: Even if the premises included the whole house, inasmuch as there was an actual forcible and violent entry into a room in the premises, there was an actual forcible and violent entry of the premises within the meaning of the policy.

In re George and Goldsmiths Insurance Association [1899] 1 Q. B. 595 discussed.

APPEAL from the judgment of Bailhache J. upon an award stated in the form of a special case.

On October 17, 1918, a policy of insurance, which was headed "Burglary and Housebreaking Policy (Business Premises only)," was effected by Calf, who carried on business as a tailor at 58 Maddox Street, London, W., with the Sun Insurance Office as follows :—" Whereas C. W. G. Calf, trading as Sampson and Calf, of 58 Maddox Street, London, W. (hereinafter called the insured), has by a proposal in writing signed by or on behalf of the insured dated 18th July, 1918, which proposal the insured has agreed shall be the basis of this contract and be held as incorporated herein, applied to the Sun Insurance Office (hereinafter called the Company) for indemnity as hereinafter mentioned and has paid to the company as first premium the sum written at the heading hereof for such indemnity for the period commencing on the 8th day of September, 1918, and ending at 4 o'clock in the afternoon on the 29th day of September, 1919.

" Now therefore this policy witnesseth that if at any time during the said period or during the continuance of this policy by renewal the property or any part thereof described and included in the aforesaid proposal and in the schedule hereto whilst contained within the premises (which expression shall not include any garden or outbuilding or other appurtenances) occupied by the insured and situate at the address mentioned in the said schedule shall be stolen by theft following upon an actual forcible and violent entry of the said premises by the person or persons committing such theft or if there shall arise any damage to the said property or to the premises falling to

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

be borne by the insured which shall be due to any such theft or to any attempt thereat then subject to the conditions endorsed hereon, which are to be taken as part of this policy, the company shall pay or make good to the insured such loss to the extent of the intrinsic value of the property so lost or such damage to the amount so sustained but not exceeding in the case of the said property the sum or sums of money insured thereon nor exceeding in the whole the sum insured by this policy as stated in the heading hereof." The sum stated in the heading was 5550*l.* In the schedule under the heading "Description and situation of premises containing the property insured," were the words "Shop situate 58 Maddox Street, London, W.," and under the heading "Specification of property or articles insured" were these four items: "On stock-in-trade as a tailor excluding furs, 4700*l.* On goods held by the insured in trust or on commission in connection with his trade or business for which he is responsible excluding furs, 300*l.* Fixtures, fittings, and utensils in trade, 350*l.* On furs held by the insured in trust or on commission for which he is responsible, 200*l.*"; making a total sum of 5550*l.*

Condition 1. indorsed on the policy provided: "This policy shall not extend to nor cover—(*a*) Loss or damage due to any theft as aforesaid, or to any attempt thereat, by any of the insured's family, or domestic servants, or any person lawfully on the premises, nor where such loss or damage has been expedited or in any way assisted or brought about by any inmate, or member of such household, or business staff." Condition 9: "The insured shall take all due precautions for the safety of the property insured, as if the same were not insured." Condition 11. provided that any difference under the policy as to the liability or the amount or extent of the liability of the company should be referred to arbitration under the Arbitration Act, 1889.

On the night of February 24–25, 1919, goods of considerable value belonging to the assured were stolen from the premises in the circumstances set out in the special case.

The company denied liability under the policy, and the

dispute was referred to Mr. MacKinnon K.C. as sole arbitrator, and it was agreed that the arbitrator should be at liberty to make an interim award dealing only with the question of the liability of the company, and reserving any question of amount.

From a plan of the ground floor and basement put in before the arbitrator and made part of the special case it appeared that the house, No. 58 Maddox Street, was on the north side of the street, the front of the house facing south. The whole width of the building on the ground floor consisted of a shop, which stretched from the front to the back of the house, and a passage alongside on the west side of the shop. The lettering of the rooms, doors and passages hereinafter given, was that marked on the plan.

The special case, except para. 2, into which the necessary descriptions from the plan are introduced, was as follows :—

2. The assured's premises were entered from the street by a door I at the west end of the front, and just inside this door another door H on the right led into the shop. A door K, opposite the street door I and just beyond the door H, gave access to the passage already mentioned running along the west side of the shop at the end of which a staircase went up to the first and higher floors. (1) By passing through the shop to its north-west corner, then through two doors G and F, and down a winding staircase, a passage W in the basement, running north and south under the passage from the street on the ground floor, was reached at its north end. Out of this passage a door E led into the trimming room, which was the front one of two rooms under the shop. Continuing along this passage southwards one passed through three doors D, C and B into a coal cellar underneath the foot pavement of the street. Besides this access to the basement from the shop through doors G and F it could also be reached from the street by descending the area steps from the eastern side of the front and going through door A in the area. The space inside door A and between doors B (the coal-cellar door)

(1) A room on the first floor was used by the assured as a fitting or trying-on room in his business.

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

and C was entirely enclosed from the outer air, and anyone standing at that spot was as much inside the basement as he would be inside the ground floor if he were standing between the doors I and K.

" 3. At night time the ground floor and basement are left locked up and unattended, except for the fact that the assured resides in a flat in the upper stories (1), to which access is had through the doors I and K. On February 24, 1919, before the assured and his staff locked up for the night the thief secreted himself in the coal cellar. He got there either by coming down the area steps and through the door A, or else by going through the shop and passing through the doors G, F, D, C, and B. In either case he passed through every door in a normal way and without the exercise of any force or violence.

" 4. The doors G and F on the stairs from the shop to the basement open from the shop side towards the basement. They can be secured by bolts which are on the shop side of each of these doors. The door E between the passage W and the trimming room in the basement opens from the trimming room towards the passage. It has a Yale lock which inside the trimming room is opened by turning a handle, and from outside in the passage is opened by a key.

" 5. When the assured and his staff shut up and left the premises for the night (the thief being then unknown to them secreted in the coal cellar) they left the doors in the following condition. The door H " (leading from the entrance passage to the shop) " was locked, and the key left somewhere in the shop. The doors G and F on the stairs to the basement were both bolted. The door E " (leading to the trimming room) " was locked, having been pushed to so that the Yale lock engaged in its socket. The doors D and C in the passage were both left open. The door B into the coal cellar was either open or not in any way locked or bolted. The door A " (leading from the area) " was locked and bolted.

" 6. After the premises were so left the thief came out of

(1) It was stated that the assured and his family resided on the second floor, and that he let the upper floors to tenants who resided there.

the coal cellar through the doors B C and D into the passage W. He entered the trimming room through the door E, and he entered the shop through the doors F and G. He took a quantity of goods, which he eventually stole, out of the trimming room, and these he carried up into the shop. It was also alleged that he took a smaller quantity of goods which were in the shop. Before leaving the premises he found in the shop the key of the door H, and he finally left the premises with the goods he stole by unlocking the door H, pulling that door to after him, and leaving the key in the lock on the inside.

" 7. The means by which the thief got through the door E into the trimming room was by inserting a sharp instrument against the catch of the lock in the opening between the edge of the door and the doorpost, and so sliding the catch back. I " (the arbitrator) " accept as to this the evidence of a police officer who inspected the premises the day after the robbery, and who saw on the catch a mark from the instrument. When I inspected the premises on July 31, 1919, I could not detect this mark. To open the door in this way, having regard to the easiness of the lock, the shortness of the catch, and the width of the space between the edge of the door and the doorpost, would not require much more muscular effort than to open it with the key, though it would require considerably more dexterity. There was no other mark or sign of the thief's operations on the door or the lock than the mark seen by the police officer on February 25, but invisible to me on July 31.

" 8. The means by which the thief got through the doors F and G from the passage W up to the shop was by the use of some instrument by which he pulled each door towards him so as to twist off the bolts on the shop side of each. These two doors were certainly broken through by the use of great violence.

" 9. Upon the facts as above stated, if it is a further question of fact I find, and if it is a question of law I hold, that the goods which were stolen were not stolen by theft following upon an actual forcible and violent entry of the said premises by the person or persons committing

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

such theft within the provisions of the said policy. I find, or hold, that the thief had entered the said premises when he had without any force or violence secreted himself in the coal cellar, and that it is not material to consider the nature of his subsequent entry through the door E to the trimming room, or through the doors F and G into the shop.

"10. I therefore award that the company are not under any liability to the assured in respect of the said theft." (Then followed directions as to costs.)

"11. If they be material matters for consideration I find or hold (1.) that in view of the facts I have found in para. 7 above the entry of the thief through the door E from the passage to the trimming room was not an actual forcible and violent entry of the trimming room, and (2.) that in view of the facts I have found in para. 8 above the entry of the thief through the doors F and G from the passage up to the shop was an actual forcible and violent entry of the shop.

"12. If the Court is of opinion that on the facts I have found in paras. 2 to 9 my award in para. 10 is correct, then my said award is to stand.

"13. If the Court is of opinion that on the facts I have found in paras. 2 to 8 and 11 the company is liable to the assured in respect of goods stolen from the trimming room, or from the shop, or from both, then I respectfully request that the matter may be remitted to me to ascertain the amount of such liability and to reconsider my directions as to costs in para. 10 above."

Bailhache J. held that the arbitrator had come to a right conclusion, and affirmed the award.

The assured appealed.

Sir Albion Richardson for the assured. There was "an actual forcible and violent entry" of the premises within the meaning of the policy. The insured premises were the assured's business premises—namely, the shop on the ground floor, the fitting room on the first floor, and the trimming room in the basement, and not the whole house. The policy only covered

goods which were upon the business premises. The coal cellar in the basement, in which the thief hid himself, did not form part of the insured premises. The policy is headed "Burglary and housebreaking policy (Business premises only)." The arbitrator was therefore wrong in finding that the thief, by entering and concealing himself in the cellar, had, without any force or violence, entered the premises covered by the policy, and that therefore there was no actual forcible and violent entry of the premises. The thief did not enter the business premises until he entered the trimming room, and there was a "forcible and violent entry" into that room. The thief used a burglarious instrument to force back the lock of the door and so opened it. There was force used, as the arbitrator has found, and the word "violent" refers, not to the degree, but to the kind of force used: per A. L. Smith L.J. in *In re George and Goldsmiths Insurance Association.* (1) "Violent" means an abnormal kind of force, as for instance, prising back the lock with an instrument. If this is not so, most of the burglaries are not covered by this form of policy. A burglar does not enter by smashing doors or windows, but by skilfully forcing back a door lock or a window latch. The arbitrator has found that to open the door of the trimming room in the way the thief did "would not require much more muscular effort than to open it with the key." He therefore found that some force more than the normal was used. Further, the shop was violently broken into and the goods were removed therefrom.

If however the insured premises included the cellar, the thief entered part of the premises by an actual forcible and violent entry—namely, both the trimming room and most certainly the shop. The arbitrator has found that the two doors from the passage to the shop were "broken through by the use of great violence." The words of the policy, "an actual forcible and violent entry of the said premises," include a forcible and violent entry into any part of those premises. The insurance company therefore are liable upon this ground.

(1) [1899] 1 Q. B. 595, 608.

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

The insurance company rely upon the decision of this Court in *George's Case.* (1) But that is a very different case. In that case the premises insured included the whole house, and there was no forcible and violent entry into those premises. The thief simply turned the handle of the outer door of the shop, walked in, and broke open a glass case in the shop and stole the contents. The Court came to the conclusion, by reason of the language in the proposal form and in a condition indorsed on the policy, that the "entry" there meant an entry from the outside of the building, and that therefore breaking open the glass case in the shop was not a forcible and violent entry on the insured premises. There is no similar condition in the policy in the present case, and the proposal form has not been produced. Moreover, there is a clear distinction between breaking open a showcase when the thief has got into the premises and breaking open a door which forms part of the structure. The decision of the learned judge was therefore wrong.

Mitchell-Innes K.C. and *G. Wood-Hill* for the insurance company. The business premises in which the insured goods are covered by the policy are the ground floor, the basement, and the first floor, within the four walls of the building; and to bring a loss by theft within the policy there must be a forcible and violent entry from the outside into those premises, as was held in *George's Case.* (1) The exclusion in the policy of "garden or outbuilding or other appurtenances" shows that all the rest of the house is included, except the residential part. There must be a "theft following upon an actual forcible and violent entry of the said premises." For instance, the common passage leading to the hall door is part of the business premises. The cellar in the basement is part of the business premises, but even before the thief got there he was already on the business premises. The assured was lessee of the whole house, and the occupiers of the top floors were his tenants, though by reason of condition 1. (*a*) indorsed on the policy there was no protection against theft by the tenants' servants because they were "lawfully on the premises." Even

(1) [1899] 1 Q. B. 595.

if the business premises did not include the cellar, and only included the trimming room in the basement, the shop, and the fitting room on the first floor, there was no forcible and violent entry into the trimming room. Pushing back the lock requires no more force than, and is of the same character as, the use of a false key, which Collins L.J. said in *George's Case* (1) would not bring the theft within the policy. A mere abnormal mode of entry is not sufficient to bring the loss within the policy. Having entered these premises without force or violence the thief was on the business premises, and no subsequent force in breaking through the doors leading to the shop is material. It must be admitted that if a forcible and violent entry into any room in the business premises brings the loss within the policy, such an entry took place into the shop, and the insurance company are liable for the loss of the goods, as those taken from the trimming room in the basement were brought into the shop before being removed from the house.

No reply was called for.

BANKES L.J. The question raised by the special case depends upon the true construction of a policy, headed "Burglary and housebreaking policy (Business premises only)" which the assured had taken out with the Sun Insurance Office upon goods at his business premises at 58 Maddox Street. The main point for decision is, what is the meaning of the word "premises" as used in the policy? A further question was raised as to whether there had been an actual forcible and violent entry into part of the premises—namely, the trimming room in the basement—but after the admission of counsel it does not seem to me to be necessary to decide it.

With regard to the main question as to the meaning of the expression "premises," it is necessary to ascertain the exact character of the house with reference to which the expression is used, and the use to which the house is put.

The house consists of four or more stories. The floors above the first floor are all used for residential purposes, the assured

(1) [1899] 1 Q. B. 610.

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

Bankes L.J.

with his family residing on the second floor, and the upper floors being let by him to tenants. The whole width of the building on the ground floor is occupied by the shop and a passage, the shop extending from the front to the back of the building. The basement is divided into two rooms and a passage. The shop, the front room in the basement, and a room on the first floor are used by the assured for the purpose of his business.

Those are the premises in respect of which this policy was effected. [The Lord Justice read the recital and the operative part of the policy.] There are certain conditions precedent laid down in the operative part. The property insured is that described in the schedule, and it is only covered whilst contained within the premises; the premises must be occupied by the assured; they must be situate at the address mentioned in the schedule, and they are described in the schedule as "shop situate 58 Maddox Street, London, W." It is admitted by both parties that the trimming room in the basement and the fitting room on the first floor, which are used by the assured solely for the purposes of his business, are included with the shop in the policy, and that the portions of the house used solely for residential purposes are not included. I may therefore read into the description of the premises in the schedule what it is admitted are included, and if that is done it is difficult to see how the question now before us could have arisen.

The facts with regard to the theft are these. The thief managed to get into a cellar in the basement under the street pavement, and we must accept the finding of the arbitrator that the thief gained access to the cellar without any actual forcible and violent entry on any part of the premises. During the night he left the cellar by the door, which was not fastened, went along the passage to the door which gives access to the trimming room, and which was fastened by means of a Yale lock. By means of an instrument he forced back—I use those words deliberately—the latch of the Yale lock sufficiently to enable him to open the door, and so gained access to that room. He took a quantity of goods from the room, and went up the

stairs from the basement to the shop. There are two doors at the top of the stairs leading into the shop, and those doors were bolted on the shop side. To get into the shop the thief had to use very great violence to smash the bolts of those doors, and it is found by the arbitrator that the amount of force used in order to obtain entry into the room through those doors constituted "an actual forcible and violent entry" into that room within the meaning of the policy. He then took some goods which were in the shop, and finding the key of the door H which led into the passage he went through that door and out by the front door into the street, taking with him the goods which he had found both in the trimming room and in the shop.

It is said on behalf of the insurance company that there was no "actual forcible and violent entry of the said premises." The "premises," it is said, mean the whole space within the four outside walls of the house, and, inasmuch as the thief obtained access into a portion of that space within the four outside walls without any forcible and violent entry, it is immaterial that he forced a lock and burst open doors to obtain access to the trimming room and shop, and the company are not liable. I am unable to accept that argument. The policy does not apply to the whole height of the building, because it is conceded that the residential portion of the premises is excluded. The space within the four walls cannot therefore be the test of what constitutes the business premises within the meaning of the policy. If a portion of the height of the building is excluded because it is used for residential purposes, why is not a portion of the width of the building to be excluded if it is partly used for residential purposes? The portion partly used for residential purposes cannot be any portion of the premises described as "business premises only," to which the policy attaches. It seems to me that when the thief made an actual forcible and violent entry into the shop he made an actual forcible and violent entry into the assured's business premises on the ground floor.

If that is the correct view, it is not material to consider whether what the thief did in the basement constituted "an

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

Bankes L.J.

actual forcible and violent entry of the said premises," because counsel for the company have admitted that, upon this view of the construction of the policy, as the thief removed the property from the trimming room into the shop, what he did with it after he broke into the shop is the material consideration. We have however had a considerable argument upon the question whether what the thief did when entering the trimming room amounted to "an actual forcible and violent entry of the said premises," and *In re George and Goldsmiths Insurance Association* (1) was referred to. It is not necessary to decide it, nor would it be wise to attempt to define those words, but as *George's Case* (1) has been cited I should like to refer to it shortly. The facts in that case were wholly different from those in the present case. No force was used in obtaining access to the premises covered by the policy. The thief simply turned the handle of the front door and walked in. In the present case the thief did something very different. Instead of finding a door through which persons were to pass by turning the handle, he found a locked door through which only an authorized person who had the key was intended to pass. To open the door he used sufficient force to force back the catch of the lock. All I need say about the words "forcible and violent entry" is that in my opinion they have reference to the character of the act by which an entry is obtained rather than the actual amount of force used in making the entry. In *George's Case* (2) Lord Russell of Killowen C.J., after pointing out that no question of principle or of general interest was involved in the decision in that case, said (3): "I conceive that the policy was directed to securing the assured against the consequences of an entry effected by real 'violence,' as the word is commonly understood, in contradistinction to an entry effected by stealth without violence as I think the entry in this case was effected." A. L. Smith L.J. said (4): "It is said that the word 'violent' has no meaning other than that of the word 'forcible' to which it is conjoined in the clause in

(1) [1899] 1 Q. B. 595.
(2) Ibid. 600.
(3) Ibid. 604.
(4) Ibid. 608.

question, and should therefore be discarded. I do not think so. In my opinion the word 'violent' was used to accentuate and give point to the kind of force which was covered by the policy, and to prevent, if possible, it being argued, as argued it has been, that, as the mere act of turning the handle of a door is the exercise of some force, therefore such an act was covered by the policy." Having regard to that language I venture to think that the learned judges who decided that case would have come to the same conclusion as we should have come to if it were necessary to give a decision on the point whether the thief made an actual forcible and violent entry into the trimming room in the basement.

I will only add this. The passages in this house are used for the residential parts as well as for the business parts; and the passage on the ground floor from the street to the stairs leading to the first and upper floors must, it seems to me, for the greater part of its length—that is, inside door K—be used very largely by the residents in the upper floors. Suppose that goods had been left in this passage, and had been stolen, would not the company have repudiated liability on the ground that the goods were not on the part used solely as business premises? Would they have adopted the attitude they now adopt and say that the whole building within the four walls, at any rate up to the first floor, was business premises? Further, my view of the construction of the policy is strengthened by this consideration, that, if the company's contention is correct, a theft effected by someone, who was a resident in the top floor of the house or who under the pretence of visiting a resident had gone upstairs and come down again, and who broke into the business part of the premises, would not be within the protection of the policy.

In my opinion the appeal must be allowed.

ATKIN L.J. I agree. The question before us is, what is the true construction of a policy entitled "Burglary and housebreaking policy (Business premises only)"? The first question is what were the business premises in respect of which the assured was protected under the policy? I feel a little

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

Atkin L.J.

difficulty in this respect, because neither the arbitrator nor this Court has seen the proposal which is incorporated in the policy, and apparently the arbitrator had no evidence before him—he has made no finding—as to the precise nature of the occupation of this house at 58 Maddox Street. What the precise rights of the assured were in respect of the basement, the cellar, the passages, and the front door are not clearly defined. For that reason I feel some little difficulty in coming to a conclusion as to the exact definition and boundaries of the premises covered by the policy. I do not at all differ from my Lord as to the construction he has put upon the policy in the light of the knowledge we possess. That is sufficient, I think, to determine this case, subject to what I have to say as to actual forcible and violent entry. Assuming however that the premises referred to in the policy are not confined to the rooms—the shop, the trimming room in the basement, and the fitting room on the first floor—I still think that there was an actual forcible and violent entry of the premises. It is to be remembered in construing this policy that it is intended to meet the case of burglary and house-breaking, though in the limited sense stated in the policy. The policy covers a loss "by theft following upon an actual forcible and violent entry of the said premises." In the first place, what is meant by an "entry of the said premises" in this connection? If this were simply a question of burglary, apart from the policy, there can be no doubt the thief would be properly indicted and convicted of breaking and entering the dwelling house, though it were shown that the whole house was a dwelling house, and though he walked through the open door of the dwelling house and only broke into one room in the house. That would be according to the established principles of the criminal law and the definition of burglary, the breaking and entering a dwelling house in the night with intent to commit a felony therein. Therefore upon an indictment charging a person with having broken and entered a dwelling house with intent to steal therein he would be convicted if it were proved that he only broke into a room in the house. In 1 Hale P. C. 553 the law

is thus stated: "If A. enters the house of B. in the night time, the outward door being open, or by an open window, and when he is within the house, turns the key of a door of a chamber, or unlatcheth a chamber door to the intent to steal, this is burglary, tho the outward door were open; and so it was adjudged upon a special verdict before me at the sessions at Newgate 1672, by advice of many judges then also present. And so it is, if a thief be lodged in an inn, and in the night he stealeth goods, and goeth away, or if he enters into the house secretly in the day time, and there stayeth till night, and then steals goods and goes away, this is not burglary"—that is, because there is no breaking—"but if in either of the cases they had opened an inner chamber door, and taken the goods, it had been burglary, agreed 1672. The servant lies in one part of the house, the master in another, and the stair-foot door of the master's chamber is latched; the servant came in the night, and unlatched the stair-foot door, and went up into his master's chamber with a hatchet intending to kill him, and wounded him dangerously, but the master escaped. Upon this special matter found at Winchester assizes, by the advice of the greater number of the judges, exceptis paucis, it was adjudged burglary, and the offender was executed." The "exceptis paucis" is explained in a note: "They all concurred, except Winch, who doubted." The law so laid down by Lord Hale has been followed ever since. It is therefore clear that a breaking and entering, the subject-matter of this policy, is satisfied by either entering the premises through an open door or being on the premises lawfully, and then breaking and entering one room in the premises; and I see no reason for placing a different construction upon the same words in this policy. Even if therefore the premises comprised the whole of the basement and the whole of the ground floor, including the passages, and though the premises were entered through an open door without any actual forcible and violent entry, yet if there was an actual forcible and violent entry into one of the rooms in the premises that would constitute

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

Atkin L.J.

"an actual forcible and violent entry of the said premises" within the meaning of the policy.

It is said that so to hold is inconsistent with the decision in *George's Case.* (1) There the Court had to construe a different policy, and they had the proposal before them, and the policy and proposal formed one document and were construed as such. Lord Russell C.J. said (2) that "no question of principle or of general interest is involved." It was a pure question of construction, and on a question of construction I protest against one case being treated as an authority in another unless the language and the circumstances are substantially identical. It is easy to distinguish that case, because, though there had undoubtedly been a breaking and entering of the shop, there had been no forcible and violent entry, and that which was said to be a forcible and violent entry upon the premises was a breaking into the showcase in the shop. The Court held upon the wording of the policy and proposal that the "entry" meant an entry from outside upon the premises as a whole, and that the breaking open of the showcase was not an "actual forcible and violent entry upon the premises" within the meaning of the policy. We have not seen the proposal in the present case. The policy is quite different, and there seems no reason for giving the words a meaning different from their ordinary meaning in this context.

Then comes the question whether there was an actual forcible and violent entry of the premises. In view of the meaning which I attach to the words "entry of the said premises" there can be no question about this, because admittedly there was an actual forcible and violent entry of the shop. Inasmuch as all the goods that were stolen were taken by the thief into the shop after he had forcibly and violently entered, and as he subsequently took all the goods from that room, it is reasonably plain that the loss was "by theft following upon an actual forcible and violent entry" of the premises. Mr. Mitchell-Innes very properly did not contest that point. Therefore it is not necessary to consider whether there was an actual forcible and violent entry of the

(1) [1899] 1 Q. B. 595. (2) Ibid. 600.

trimming room. As, however, the point has been argued and the arbitrator has expressed an opinion upon it, I desire to say that in my opinion there was an actual forcible and violent entry of that room. In ordinary language the lock was forced, and forced in such a sense that it could properly be said that the room was forcibly and violently entered. It is perhaps not altogether immaterial to remember that an indictment for burglary in the old days stated that " J. S. " on a certain day " in nocte ejusdem diei vi et armis domum mansionalem A. B. felonice et burglariter fregit et intravit "—and a declaration in trespass quare clausum fregit contained the words vi et armis et contra pacem—and that the averment that the dwelling house was broken and entered by force and arms was proved merely by establishing that the latch of the door was lifted or the key was turned. I agree that something more than that is meant by the words " actual forcible and violent entry." At the same time one must remember that this is a business document relating to protection against burglary and housebreaking, and is intended, one would assume, to be a protection against the ordinary methods of burglars and housebreakers. I think that the view taken by the learned judges in *George's Case* (1) was this : that by the words " actual forcible and violent entry " it was intended to mean an entry effected by the exercise of force in a manner that was not customary in order to overcome the resistance of the usual fastenings and protections in the premises. If a person turns a key he uses force but not violence. If he uses a skeleton key, he uses force but not violence. If on the other hand instead of using a key he uses a pick-lock, or some other instrument, or a piece of wire, by which as a lever he forces back the lock, it appears to me that he uses force and violence, and in the present case both force and violence were used.

I am glad to come to this conclusion, because it seems to me to give effect to what must have been the intention of the parties. To give effect to the company's contention would be to treat the policy as having no relation to business needs or business intentions.

(1) [1899] 1 Q. B. 595.

C. A. 1920

For these reasons I think that the appeal should be allowed, and the case remitted to the arbitrator.

CALF AND SUN INSURANCE OFFICE, *In re.*

YOUNGER L.J. I so entirely agree with the judgments which have been delivered that, if we were not differing from the learned judge below and the learned arbitrator, I should not add anything. I will add a few words on one question only—namely, what are the business premises the contents of which are insured by this policy against loss "by theft following upon an actual forcible and violent entry of the said premises"?

The premises are on the face of the policy stated to be situate at 58 Maddox Street, London, W. It is however "business premises only" which are referred to. They are in the schedule compendiously described as "shop." No. 58 Maddox Street consists partly of business premises and partly of rooms used for residential purposes. So far as the residential portion is concerned, one floor is occupied by the assured and his family and the rest by tenants of the assured. The question is whether the business premises, whose contents are alone insured, are confined to the business premises strictly so called, or whether they include those parts which are jointly used by the assured and others for purposes which are not exclusively business purposes. The argument on behalf of the insurance company on this point was mainly rested on the definition or description of the premises in the body of the policy, namely, "the premises"—that is, the business premises—"(which expression shall not include any garden or outbuilding or other appurtenances) occupied by the insured and situate at the address mentioned in the said schedule." The argument, as I understand it, is that, as there is excluded from the definition of the premises only a garden or outbuilding or some other appurtenance, there must be deemed to be included within it anything not a garden, outbuilding, or appurtenance, in this case a passage and a coal cellar. I do not read the definition as having that effect. The words of exclusion, to my mind, mean no more than this: that, though a garden, an outbuilding, or an appurtenance

might in a particular case be regarded as being business premises, they are not for the purposes of this policy to be included in that expression. Those words of exclusion are not to be utilized to extend the ordinary meaning of business premises occupied by the insured.

The question then is whether the coal cellar and passage, those being the parts of the premises material to this point, are business premises within the meaning of the policy, though in fact they are not in the sole occupation of the assured, and are certainly not used exclusively as business premises? To my mind it is clear upon the policy that they are not part of the business premises. Looking again at the words of exclusion it is, I think, reasonably clear that the reason for the exclusion of garden, outbuilding, or other appurtenances is that the assured cannot exercise over them that amount of care and supervision which would be some protection to the insurer, if exercised. Accordingly the insurer was not willing to take any risk with reference to the contents of those parts of the premises. In my opinion too this policy extends only to premises in the sole occupation of the assured as business premises. Condition 9 provides that "the insured shall take all due precautions for the safety of the property insured, as if the same were not insured." That indicates that the contents insured are property over which the assured is in a position to take precautions by virtue of his exclusive occupation, and the insurer would certainly not contemplate liability for theft of goods left about in a passage to which others besides the assured had access. The same result is indicated also by condition 1, which provides: "This policy shall not extend to nor cover—(*a*) Loss or damage due to any theft as aforesaid, or to any attempt thereat, by any of the insured's family, or domestic servants, or any person lawfully on the premises, nor where such loss or damage has been expedited or in any way assisted or brought about by any inmate, or member of such household, or business staff." The company's construction of the policy involves this curious result, that the assured's tenant, or a member of the tenant's family, or one of his domestic servants, must be taken to be

C. A. 1920

CALF AND SUN INSURANCE OFFICE, *In re.*

Younger L.J.

lawfully on the insured premises, because according to the company's view the premises include the passages, etc., and a theft by one of them would not be covered by the policy; but that if the thief were merely assisted by the tenant or a member of his family or one of his servants the company would have no defence against a claim, because the assistance referred to is confined to loss "assisted or brought about by any inmate, or member of such household, or business staff," that is, of the assured himself.

The result is that, looking at the body of the policy and the conditions mentioned above, the company were carefully limiting their risk, so that the only premises included in the policy were the exclusive business premises of the assured occupied as such by him and by him only. It follows that there has been an actual forcible and violent entry upon these premises by the thief, who has taken away therefrom the goods of the assured, and the latter is entitled to recover.

Appeal allowed. Case remitted to arbitrator.

Solicitors for assured: *Lumley & Lumley.*
Solicitors for Insurance Company: *Dawes & Sons.*

W. F. B.

BARWICK AND OTHERS v. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES.

1920
March 16.

Poor Rate—Solid Stone Pier extending into Sea—Rateability of—"Accretion"—Poor Law Amendment Act, 1868 (31 *&* 32 *Vict. c.* 122), *s.* 27—*Claim for Declaration of Liability to Rates—Jurisdiction of High Court to Order.*

By s. 27 of the Poor Law Amendment Act, 1868: "Every accretion from the sea, whether natural or artificial, shall" for all civil parochial purposes "be annexed to and incorporated with the parish to which such accretion adjoins."

A harbour board under the powers of a special Act reclaimed from the sea certain land below low-water mark for the purpose of making thereon a railway station. The reclamation was effected by building masonry walls round the land and filling up the intervening space between the walls with chalk. By the terms of the special Act the board was required to grant a lease of the land when sufficiently reclaimed to the defendants. Upon the outbreak of the war in 1914 and before any lease was granted to the defendants the Government took possession of the reclaimed land and retained possession of it during the whole war. In 1917 the then overseers of the parish to which the said land adjoined, with the view of establishing the liability of the defendants to pay rates for it if and when they should enter into occupation of it under the contemplated lease, brought an action in the High Court for a declaration that the reclaimed land was an "accretion from the sea" within s. 27 of the Act of 1868 and as such formed part of their parish:—

Held: 1. That the High Court had jurisdiction to entertain the action, notwithstanding that its object was to establish a liability which could be enforced only in a Court of summary jurisdiction; and notwithstanding further that the defendants at the date of the writ had no interest in the premises, they not being the occupiers, and that the plaintiffs had no interest in them at the date of the judgment, they having then ceased to be the overseers.

2. That the reclaimed land was an accretion from the sea and formed part of the plaintiffs' parish.

TRIAL of action before Darling J.

The Dover Harbour Board acting under the powers conferred by the Dover Harbour (Works, etc.) Act, 1906 (c. ccv.) reclaimed from the sea certain land eleven or twelve acres in extent immediately adjoining the east side of the existing Admiralty Pier. The whole of the land so reclaimed was below low-water mark. The object of the reclamation was to effect a widening of the Admiralty Pier, in order to allow of a railway station and sidings being constructed on it. The

1920

BARWICK v. S. E. & C. R. COS.

reclamation was effected by means of the erection of solid masonry walls and by filling in the intervening space between the walls with chalk. By the terms of the Act the Board was to grant a lease of the land to the defendants as soon as it was sufficiently reclaimed. The contemplated lease was not in fact granted to them till June, 1919. On the outbreak of the war in 1914 the Government took possession of the site and used it as a station for landing wounded soldiers, and continued in occupation of it throughout the war. In 1916 the overseers of the parish of Dover made a supplemental valuation list which included the land in question, and in which the defendants were stated to be the occupiers. The defendants objected to the said valuation list upon the grounds that the land in question was not within the parish of Dover, and that they were not in beneficial occupation of it. The overseers then made an application to the Government for a contribution in lieu of rates in respect of the Government occupation. But the Government declined to make such a contribution until it was settled that the property would be rateable if it were in the occupation of a subject, and suggested that proceedings should be taken to determine that question. Accordingly in May, 1917, the plaintiffs who were the then overseers of the parish of Dover brought this action for a declaration that the said reclaimed land was part of the parish of Dover for all civil parochial purposes within the meaning of s. 27 of the Poor Law Amendment Act, 1868.

Montgomery K.C. and *Thesiger* for the plaintiffs. Section 27 of the Poor Law Amendment Act, 1868, provides that " Every accretion from the sea, whether natural or artificial . . . . which on the twenty-fifth day of December next shall not be included within the boundaries of or annexed to and incorporated with any parish, shall for the same purpose "—all civil parochial purposes—" be annexed to and incorporated with the parish to which such accretion . . . . adjoins," and the present declaration was sought for the purpose of establishing the liability of the defendants to pay rates for the land so soon as they should enter into occupation of it and in the meantime to found a

claim against the Government for a contribution in lieu of rates. Every reclamation of land from the sea by means such as those here employed is an artificial accretion within that section, and it is not disputed that the land so reclaimed adjoins the parish of Dover.

Disturnal K.C. and *Scholefield* for the defendants. There is a preliminary objection, that this action will not lie at all. There is no right to come to the High Court for a declaration when the object is to establish a liability, such as that to rates, which can only be enforced in a Court of summary jurisdiction. Money due for rates is not a debt which can be sued for in the High Court, it is recoverable only by distress. In *Barraclough* v. *Brown* (1) it was held by the House of Lords that where a statute gives a right to recover expenses in a Court of summary jurisdiction from a person not otherwise liable, he can only take proceedings in that Court; he cannot ask the High Court for a declaration of his right to recover them. Lord Watson said: "I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature"; and in the case of rates its jurisdiction is excluded by the Act of Elizabeth. The same thing had previously been held in *Institute of Patent Agents* v. *Lockwood* (2), where an action was brought in the Court of Session for a declaration that the respondent was not a registered patent agent under the Patent Designs and Trade Marks Act, 1888, and it was held that the action was incompetent, the right mode of procedure against an unregistered patent agent being by summary proceedings under the Act for a penalty. Here the plaintiffs' proper remedy was to call upon the assessment committee to give a decision on the validity of their valuation list, and if the decision was against them to appeal to quarter sessions. But there is also another objection to this action, that the persons who commenced it have no longer any interest in the matter. They were overseers for the year 1917. But overseers are not a corporation. The overseers in office at the present time are different persons.

(1) [1897] A. C. 615, 622. (2) [1894] A. C. 347.

1920

BARWICK v. S. E. & C. R. Cos.

Even if by accident they happened to be the same that would make no difference for they would be different persons in point of law. It is true that in *Guaranty Trust Co.* v. *Hannay* (1) it was held that the Court might make a declaration at the instance of a plaintiff although he has no cause of action against the defendant, but Pickford L.J. pointed out (2) that Ord. XXV., r.5, does not "enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions," and here the plaintiffs in this action are entire strangers to the transaction of recovering rates in Dover in 1920. Further, an action for a declaration ought not to be brought against defendants who have no interest in the matter, and here at the date of the writ the defendants were not in occupation of the land, and it was conceivable that they might never be, for the railways might have been nationalized before they got their lease.

Montgomery K.C. in reply. This action comes within the terms of Ord. XXV., r. 5, by which "the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." Pickford L.J. in *Guaranty Trust Co.* v. *Hannay* (2) said that "the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration." Here the overseers of Dover are undoubtedly interested in the subject-matter. The objection on the ground of absence of legal identity between the overseers of one year and those of another is highly technical and ought not to preclude them from getting a decision on an important matter which is otherwise unobtainable, for it may well be that the assessment committee would refuse to decide this point; they might content themselves with holding that the defendants at the date of the writ were not occupiers.

DARLING J. Certain land about eleven or twelve acres in extent adjoining the Admiralty Pier at Dover having been reclaimed from the sea, and a railway station having been

(1) [1915] 2 K. B. 536. (2) Ibid. 536, 562.

constructed on it, the overseers of the parish of Dover were desirous of rating the occupiers of that land, and brought this action claiming a declaration "that the said reclaimed land is part of the parish of Dover for all civil parochial purposes within the meaning of s. 27 of the Poor Law Amendment Act, 1868." Mr. Disturnal objects that this Court has no jurisdiction to entertain the action. For that proposition he relies on *Barraclough* v. *Brown* (1) and *Institute of Patent Agents* v. *Lockwood*. (2) On the strength of those cases he contends that Ord. XXV., r. 5, which provides that "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not" does not allow of my making the declaration asked for.

The overseers included this land in a new valuation list in 1916, alleging the defendants to be the occupiers. The defendants objected to the valuation list before the assessment committee upon the grounds that the land in question was not in the parish and that even if it was they were not the occupiers. The assessment committee have not yet given any decision upon those objections, and Mr. Disturnal says the plaintiffs' proper remedy is to wait until the assessment committee decide the matter, and then if the decision is against them appeal to quarter sessions. The position is this: The Government, if they are the occupiers, are willing to pay a contribution in lieu of rates provided the land in question is the proper subject-matter of a rate, so that the defendants if they were in occupation would be liable to be rated for it, and the Government suggested accordingly that before they could be asked to make any contribution this question of rateability should be first determined. In those circumstances this claim for a declaration seems a very reasonable one for the plaintiffs to make. The only question is whether the authorities preclude me from holding that the action will lie. I do not think that there is anything in either of the cases relied on for the defendants which conflicts with the

(1) [1897] A. C. 615. (2) [1894] A. C. 347.

1920

BARWICK v. S. E. & C. R. COS.

judgment of Pickford L.J. in *Guaranty Trust Co.* v. *Hannay.* (1) Speaking of Ord. XXV., r. 5, he there says: "I think that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration." Here it is impossible to say that the plaintiffs are not very much interested in the subject-matter of the declaration which they ask. The Lord Justice goes on: "It does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions." That is the only limit; and I think it clear that those latter words have no application to the plaintiffs. They are obviously not strangers seeking the opinion of the Court for their assistance in other transactions, but are desirous of getting an important question decided in which they and the defendants are mutually interested. If the plaintiffs were to adopt the procedure which Mr. Disturnal says is the proper one it may be they would never get the point decided at all. The assessment committee might decide in the defendants' favour without ever deciding whether this reclaimed land was an accretion from the sea. They might find that the defendants were not in occupation at all, or that if they were in occupation their occupation was not beneficial, and might leave the question of the rateability of this piece of land untouched. For these reasons I come to the conclusion that this Court has power to entertain the action.

Disturnal K.C. for the defendants. This structure which the Harbour Board have erected on the bed of the sea is not an "accretion from the sea" within the meaning of the Act of 1868. Not every reclamation is an accretion. An "accretion" is a growth involving a gradual process, though possibly assisted by artificial means. In *Blackpool Pier Co.* v. *Fylde Union* (2) Lord Coleridge C.J. said: "It is said that if this pier had been a solid structure instead of resting on iron pillars it would be an accretion. I think it would not, and that a building thrown out into the sea is not an accretion from the sea."

(1) [1915] 2 K. B. 536, 562. (2) (1877) 46 L. J. (M. C.) 189, 192.

The present structure is merely a widening of the old Admiralty Pier and must stand on precisely the same footing as that pier. Yet the overseers have for many years recognized that that pier was not an accretion from the sea, for they have never attempted to rate it.

Montgomery K.C. Lord Coleridge's dictum in the *Blackpool Case* was only obiter.

DARLING J. The Dover Harbour Board has reclaimed a certain piece of land from the sea, and the question is whether that piece of reclaimed land forms part of the parish of Dover for civil parochial purposes within the meaning of s. 27 of the Poor Law Amendment Act, 1868. That section says that: "Every accretion from the sea, whether natural or artificial. . . . which on the 25th day of December next shall not be included within the boundaries of or annexed to and incorporated with any parish shall for the same purposes"—i.e., all civil parochial purposes—"be annexed to and incorporated with the parish to which such accretion . . . . adjoins." The Harbour Board found at Dover the sea flowing over the site on which the railway station now stands. They set to work to exclude the sea by building a wall round that site and filling up the space inside the wall with chalk. The effect of that was that there was an artificial accretion from the sea. But what was the accretion? Not the wall and chalk. To my mind the accretion was the site, that portion of the bed of the sea on which this structure was placed. The dictum of Lord Coleridge C.J. in *Blackpool* v. *Fylde Union* (1) on which Mr. Disturnal relies does not in my opinion assist him. Lord Coleridge said: "It is said that if this pier had been a solid structure instead of resting on iron pillars it would be an accretion. I think it would not, and that a building thrown out into the sea is not an accretion from the sea." I quite agree. In the present case I do not think this structure is an accretion from the sea because it did not come from the sea. The chalk came from the Dover cliffs and the masonry from some quarry. But when you

(1) 46 L. J. (M. C.) 189, 192.

1920

BARWICK v. S. E. & C. R. COS.

Darling J.

put up a wall on land below low-water mark and exclude the sea, the land which theretofore was under water and from which you so exclude the sea does thereby become an accretion from the sea. The accretion is the reclaimed site and not that which you put on it. The actual decision in the *Blackpool Case* is plainly not in point, nor was it suggested that it was. The pier in that case consisted of iron pillars with a superstructure imposed on them, and the sea continued to flow over the land beneath the pier as before, the low-water mark remaining unaltered, whereas, as Grove J. then said, the object of the section "was to deal with the case of an accretion to land, which, whether formed by natural or artificial means, might cause a variation in the low-water mark." There the low-water mark was not altered, here it is. That is the distinction between the two cases. I am of opinion that this piece of reclaimed land which was part of the bed of the sea has, by the exclusion of the sea from it, become part of the realm of England, and by the operation of s. 27 part of the parish of Dover. There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Sharpe, Pritchard & Co., for R. E. Knocker, Dover.*

Solicitor for the defendants: *Herbert H. Groves.*

J. F. C.

HARVEY AND COMPANY *v.* HEREFORDSHIRE COUNTY COUNCIL.

1920.

April 20.

Fertilisers and Feeding Stuffs—Sale of—Giving false Invoice—Prejudice of Purchaser—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 6, *sub-s.* 1 (*b*).

By s. 6, sub-s. 1, of the Fertilisers and Feeding Stuffs Act, 1906: "If any person who sells any article for use as a fertiliser of the soil. . . . . (*b*) Causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser" he shall be liable to a penalty:—

Held, that a seller who in fact delivers a false invoice commits an offence under s. 6, sub-s. 1 (*b*), whether the nature of the article is such as to make it obligatory on him under s. 1 to deliver an invoice or not.

CASE stated by justices of Herefordshire.

The appellants were summoned on an information laid by an officer of the respondents charging that they on selling a certain article called "shoddy" for use as a fertilizer of the soil caused an invoice of the article so sold to be false in a material particular by stating that it contained 6 per cent. of ammonia to the prejudice of the purchaser, contrary to s. 6 of the Fertilisers and Feeding Stuffs Act, 1906. (1)

At the hearing the following facts were proved or admitted. A Mr. Dean Dent, in August, 1919, ordered of the appellants ten tons of shoddy at the price of 45*l.*, and in pursuance of that order the appellants consigned that quantity of shoddy

(1) By the Fertilisers and Feeding Stuffs Act, 1906, s. 1, sub-s. 1: "Every person who sells for use as a fertiliser of the soil any article which has been subjected to any artificial process in the United Kingdom . . . . shall give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen . . . . contained in the article, and the invoice shall have effect as a warranty by the seller that the actual percentages do not differ from those stated in the invoice."

Sect. 6, sub-s. 1: "If any person who sells any article for use as a fertiliser of the soil . . . . commits any of the following offences, namely:—

(*a*) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act; or

(*b*) Causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser" he shall be liable to a penalty.

1920

HARVEY & CO. v. HEREFORDSHIRE COUNTY COUNCIL.

from Wakefield by rail to the purchasers at Withington Station, Herefordshire. On August 18 they sent him an invoice which stated that it contained 6 per cent. of ammonia. On the arrival of the shoddy the purchaser was dissatisfied with its moist appearance, and requested the official sampler for the county of Hereford to take samples. Samples were accordingly taken and were analysed by the agricultural analyst for the county, who certified that the shoddy contained nitrogen 1.17 per cent. equal to ammonia 1.42 per cent.; water 29.87 per cent. On the result of the analysis being communicated to the appellants they offered to make Mr. Dent an allowance off the contract price, so that the price should be reduced to correspond to the units of ammonia certified. Mr. Dent at first refused to accept the shoddy, but subsequently agreed to accept it at the reduced price of 10*l.* 13*s.* 9*d.* The justices found that Mr. Dean was prejudiced in the purchase of the shoddy by reason of the fact that, relying on the shoddy being of the quality contracted to be sold, he did not take an opportunity which presented itself between the date of the contract and the delivery of purchasing other shoddy of a high quality. "Shoddy" is a well-known article and well known as a fertilizer of the soil, being the refuse and waste from wool and cloth mills. Although wool is subjected to an artificial process by combing and tearing, in order to produce blankets and cloth, yet the waste and refuse from that process, and of which the shoddy in question formed part, is not subjected to any further artificial process. Sometimes shoddy, in order to reduce its bulk, is subjected to a certain process, and is then generally called "dissolved shoddy," and commands a higher price and is an entirely different article from the shoddy which was the subject-matter of these proceedings.

It was contended on behalf of the appellants (inter alia) that the seller of a fertilizer who delivers an invoice which is false does not commit an offence under s. 6, sub-s. 1 (*b*), unless it is an invoice which is required by the Act; and shoddy is not an article in respect of which the seller is required by the Act to give the purchaser an invoice. The justices overruled the contention and convicted the appellants.

1920

HARVEY & CO. v. HEREFORDSHIRE COUNTY COUNCIL.

Jenkins K.C. and *Hon. Reginald Coventry* for the appellants. The paragraph under which the appellants have been convicted, s. 6, sub-s. 1 (*b*), must be read along with the preceding paragraph, sub-s. 1 (*a*), and the "invoice" referred to in (*b*) means an invoice of the kind referred to in (*a*), that is an "invoice required by this Act." Those latter words refer back to s. 1, sub-s. 1, from which it appears that the only kind of article sold as a fertilizer, on the sale of which the Act (so far as is applicable to the present case) requires the delivery of an invoice, is an article "which has been subjected to an artificial process." Shoddy is not such an article. The combing and tearing of the wool by which the shoddy is removed is not an artificial process within the meaning of the Act, for it does not affect the chemical composition of the thing so removed, and even if it is an artificial process, what is subjected to it is not the shoddy but the whole fleece. Nothing is done to the shoddy after it is separated. In *Worcestershire County Council* v. *Notley* (1) it was held that "sharps," which is one of the three products into which wheat is separated upon being ground (the others being flour and bran), is not an article which is "artificially prepared" within the meaning s. 1, sub-s. 2, of the same Act. (2)

J. H. Thorpe for the respondents.

EARL OF READING C.J. This appeal must be dismissed. The appellants were convicted under s. 6 of the Fertilisers and Feeding Stuffs Act, 1906, for that on selling a certain article, to wit "shoddy," for use as a fertilizer of the soil to one Dean Dent they caused a certain invoice of the said article so sold by them to be false in a certain material particular by stating that it contained 6 per cent. of ammonia. The appellants having received an order for a quantity of shoddy consigned the stuff to the purchaser, and at or about the same time sent him an invoice, which stated that the shoddy so consigned contained 6 per cent. of ammonia. The shoddy was delivered, and the purchaser, on receipt of it, not liking its appearance,

(1) [1914] 3 K. B. 330.

(2) Other contentions were raised on behalf of the appellants, but they did not call for a report.

1920

HARVEY & Co. v. HEREFORDSHIRE COUNTY COUNCIL.

Earl of Reading C.J.

had it analysed, with the result that it was found to contain a much smaller percentage of ammonia than that invoiced. It is contended that on those facts the appellants committed no offence. Whether they did or not turns upon the construction of s. 6, sub-s. 1 (*b*), which makes the seller of a fertilizer liable to a penalty if he "causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser." The appellants say that only applies to a sale of the kind of goods in respect of which an invoice is required by s. 1, that is to say, to the sale of an article "which has been subjected to an artificial process," and which it is said shoddy is not. I do not agree. Taking the words of clause (*b*) in their ordinary sense they must be understood as making it an offence in the seller of a fertilizer to give an invoice of the article sold which is false in fact unless it is unreasonable so to construe them. I do not think it is unreasonable. It is in harmony with the rest of the section. In sub-s. 1 (*a*) it was intended to make it an offence to fail to deliver invoice in those cases in which the seller was required by s. 1 to deliver an invoice, while sub-s. 1 (*b*) was intended to make it an offence to deliver an invoice which is in fact false, whether the seller is required by s. 1 to deliver an invoice or not. Clause (*b*) is wider than clause (*a*). The latter speaks expressly of "the invoice required by this Act," whereas the former was the term "any invoice" without any such qualification. As we take this view of the meaning of the Act it is unnecessary to consider the question whether shoddy is an article which is subjected to an artificial process, though I am inclined to think that *Worcestershire County Council* v. *Notley* (1) does not apply, the words which the Court there had to deal with being different.

AVORY and ROCHE JJ. concurred.

Solicitors for the appellants: *Timbrell & Deighton for Thos. G. Dobos, Worcester.*

Solicitors for respondents: *Indermaur & Brown for Corner & Wadsworth, Hereford.*

J. F. C.

(1) [1914] 3 K. B. 330.

THOMAS, APPELLANT *v.* JONES, RESPONDENT.

1920

April 20, 22, 26.

Bastardy—Corroboration—Evidence of—Cumulative Effect of Facts which singly are not Evidence of Corroboration—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

The appellant was charged on complaint with being the father of a bastard child of the respondent. The appellant was a farmer and a bachelor. The respondent was his housekeeper. On the morning of the birth, when the respondent was in labour, the appellant, who had no other female servant, lit a fire for her and took her some tea and brandy. He also sent for the doctor. After the birth he allowed her and the child to remain for five weeks in his house. There was no evidence whether she was sufficiently recovered to have left at an earlier date. The appellant admitted that during those five weeks he never asked the respondent who was the father of her child. After the respondent had left his house she wrote him a letter charging him with being the father of the child, and asking if he meant to pay for its maintenance. To that letter he made no reply :—

Held, by the Earl of Reading C.J. and Roche J. (Avory J. dissenting), that though no one of the above facts, taken singly, may have amounted to evidence of corroboration of the respondent's statement that the appellant was the father of her child, their cumulative effect was such that, taken collectively, they did amount to such evidence.

CASE stated by justices of the county of Radnor.

A complaint was preferred by Miriam Jones the respondent against the appellant David Thomas alleging that he was the father of a bastard child of which she was delivered on May 11, 1919.

At the hearing the following matters were deposed to by the respondent :—

The respondent is a single woman aged twenty-five, and on May 11, 1919, she was delivered of a female child at Llwynbeadd Farm, where the appellant lives. The appellant is a bachelor aged forty-three. The respondent went to work for the appellant as his servant and housekeeper in May, 1917, and remained there till June 17, 1919. During that time men, other than the appellant, lived and slept in the house. The appellant had connection with the respondent some time before she had been in the house twelve months, but she could not say at what date. Afterwards

1920

THOMAS v. JONES.

the appellant also had connection with the respondent, but she could not say how often. In July or August, 1918, the respondent went to a doctor, and he told her something about herself, and when she returned to Llwynbeadd she told the appellant that the doctor had told her she was in the family way. The respondent denied to everybody else, on being asked, that she was in the family way, because she did not want to tell her business to other people. On the morning of May 11, 1919, when her child was born, the respondent was ill and moaning, and did not remember everything that happened. Early that morning the appellant made a fire and gave the respondent some brandy and tea in the kitchen. A doctor was sent for, and a Miss Evans came to the house. The respondent remained in the appellant's house until June 17, 1919. On May 12, 1919, her time of service with the appellant at Llwynbeadd was finishing, and when the child was born on the preceding day she had already packed her box. The appellant on being asked by the respondent what he was going to do about the child said: "There is nothing for me to do but to pay you a lump of money." Later, on June 16, 1919, the appellant asked the respondent to take the child to be brought up by a Miss Mills, and that he would pay the money on the quiet. After the respondent left the appellant's house she wrote him three letters, one on June 21, another on July 14, and a third on August 16, 1919. The letter of July 14 was as follows: 'Llangors, Pantydwr, Rhayader. Mr. Thomas, Dear Sir, I just take the priviledge of writing these few lines to you hoping you are well as it leaves me at present. I should like to know what you intend doing in regard to the child, Do you intend paying or not? If not I must see further about it for it is useless waiting. It is not as if you are paying for another man's child as you know the child is yours and no one else. I should be pleased to know by return of post one thing or the other. I conclude, Your's truly, Miriam Jones." No reply to any of these letters was received by the respondent.

The appellant was called by the respondent as a witness,

and denied the paternity of the child, and all the allegations of the respondent connecting him with the paternity, and that he ever had connection with her. He stated that he did not know she was in the family way until the child was born, and that Miss Evans sent for the doctor; he did not. The appellant further deposed to the following facts: He knew the respondent went to a doctor in August, 1918, because he saw some medicine in the kitchen, and asked if she was not well, and that she told him the doctor had made some impudent remarks about her. He did not ask what they were. He made a fire in the kitchen and gave her brandy on the morning the child was born. He did not ask the respondent who was the father of the child during the time she was in his house after her confinement. He had received only one letter from the respondent, which was in July, and is the letter above set out. He did not reply to it because he thought it was blackmail. When she had the child he told her she must go.

The respondent called John Price, a farm servant, who deposed as follows: He lived at the appellant's house whilst the respondent was housekeeper there. On the day that the respondent was confined the appellant asked him to go to see Dr. Gordon Richardson.

No evidence other than that of the respondent, the appellant, and John Price was called on behalf of the respondent, and at the close of her case the appellant's solicitor submitted that the evidence of the respondent had not been corroborated in some material particular in accordance with the provisions of the Bastardy Laws Amendment Act, 1872, and contended that the complaint ought to be dismissed.

The justices were of opinion that the evidence of the respondent had been corroborated by the fact that the appellant sent the witness John Price for the doctor on the morning of the birth of the child, that he allowed the respondent and the child to remain in his house until June 17, and did not during that time ask the respondent who was the father of her child, and did not answer the letter of July 14 which he stated he had received, and by the demeanour of the witnesses

1920

THOMAS v. JONES.

and the way the evidence was given by the respondent. They accordingly adjudged the appellant to be the father of the respondent's child.

The question for the opinion of the Court is whether upon the above statement of facts the justices came to a correct decision in point of law.

Roome and *McClure* for the appellant. None of the facts relied on by the justices afforded any evidence of corroboration. A fact which is equally consistent with innocence or guilt is evidence of neither. That the appellant sent for the doctor when the woman was in labour is no evidence of corroboration. For, under the circumstances, what else could he do? It was an act of simple humanity. And the same observation may be made with reference to his allowing her to remain in his house during the period of her convalescence. Kindness to a woman in trouble ought not to be regarded as raising a presumption of guilt. That he did not inquire who the father was may well be excused, as it was a distasteful inquiry to enter upon. It was not his business to discover that fact, and mere curiosity is not commendable. Then the fact that he did not answer the letter charging him with being the father of the child and demanding money was clearly not evidence of corroboration. It was the proper course for an innocent man to take: *Wiedemann* v. *Walpole*. (1)

Davenport for the respondent. It must be conceded that the weight of the evidence is not for this Court to consider. They have only to determine the question of its relevancy. Lord Alverstone in *Reffell* v. *Morton* (2) said: "The weight of the evidence is for the justices; if corroborative evidence is put forward, and the justices are satisfied with it, we ought not to interfere." And it may be that each of the facts relied on by the justices in this case, if looked at by itself, cannot be regarded as evidence of corroboration. But cumulatively they do amount to such evidence. The appellant at the time of the birth not only sent for the doctor, but denied having done so. That denial looks as if it proceeded

(1) [1891] 2 Q. B. 534. (2) [1906] 70 J. P. 347, 351.

from fear of the interpretation that would be put upon his act. It raises more than a case of suspicion. An innocent man would presumably have at once admitted it. In *Dawson* v. *M'Kenzie* (1), an action of affiliation and aliment, Lord McLaren said: "I think that in this class of cases . . . . it is not sufficient corroboration if you merely displace the evidence of the defender and show that he has made false statements. There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence, i.e., his denial of circumstances which are otherwise proved, is to show that there is something of which he is ashamed, or something the admission of which he conceived would throw suspicion upon himself, this will put a different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties." And in *M'Whirter* v. *Lynch* (2) Lord Dunedin quoted that opinion of Lord McLaren with approval. Those two dicta were undoubtedly obiter, as the facts were found in favour of the defender in both cases, but so far as they go they support the present respondent's contention. In the next place the appellant allowed the respondent to remain in his house for a time far exceeding the usual period of recovery in such cases. No explanation of that fact was offered, and the onus lay on the appellant to explain it. Thirdly, he did not answer her letter. It is conceded that, taken by itself, that fact is not sufficient. But in *Wiedemann* v. *Walpole* (3) Bowen L.J. suggested that silence would be evidence of an admission if the circumstances were such as to render it "more reasonably probable that a man would answer the charge made against him than that he would not." And here if the appellant were an innocent man it would have been more reasonably probable that, in view of the other facts of the case which he knew would cast suspicion on him, he would answer the letter and repudiate the charge of paternity than that he would maintain silence. All these facts taken together amount to evidence of corroboration on which the

(1) (1908) 45 Sc. L. R. 473, 475. (2) (1908) 46 Sc. L. R. 83.
(3) [1891] 2 Q. B. 534, 539.

1920

THOMAS v. JONES.

justices were warranted in finding the charge of paternity proved.

McClure in reply.

Cur. adv. vult.

April 26. The following written judgments were delivered:

EARL OF READING C.J. At the hearing of a complaint preferred by the respondent Miriam Jones against the appellant Thomas under the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), the justices adjudged the appellant to be the putative father of the respondent's child born on May 11, 1919. The appellant brings this appeal by way of special case, and the sole question for this Court is whether or not the evidence of the mother is in the words of s. 4 of the Act of 1872 "corroborated in some material particular by other evidence to the satisfaction of the justices." It is not for this Court to decide the facts; our province is to determine whether or not there is in law evidence of corroboration. If there is it is for the justices and not for this Court to pronounce upon its value; if there is not this Court must reverse their decision.

The respondent was servant and housekeeper to the appellant, who is a bachelor, at a farm in Wales, from May, 1917. She continued to reside there till June 17, 1919. She gave evidence of circumstances which, if believed (apart from the necessity in law of corroboration), proved that the appellant was the father. He was called as a witness by her and denied all the circumstances which connected him with the paternity of the child. The child was born on May 11, 1919. On that morning she was in labour, and the appellant made the fire and took brandy to her. John Price, a farm servant, who lived at the appellant's house whilst the respondent was servant and housekeeper there, stated that on that day the appellant asked him to fetch the doctor; the appellant denied that he had sent for the doctor. The justices found that the appellant did send for the doctor. The respondent remained at the appellant's house till June 17, 1919, over

five weeks after the birth of the child. The appellant stated that when she had the child he told her she must go. She did in fact remain, and there is no explanation of this fact. It might well be that she was too ill to leave earlier, but there is no evidence or even suggestion in the case stated to this effect. She remained there during these five weeks without any question being raised by the appellant as to the paternity of this child born in his house of a servant in his employ. She sent a letter dated July 14, 1919, asking him to support the child and stating "You know the child is your's." He did not answer the letter. I fully agree with the observation of Lord Esher M.R. in *Wiedemann* v. *Walpole* (1) that the mere fact of not answering a letter containing an assertion is no evidence whatever of an admission of the truth of the assertion. In the present case the mere fact of not answering the letter of July 14 is not evidence in corroboration, but with other circumstances I think it may be. To use the language of Lord Bowen, then Bowen L.J.: "Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not." (2) The Legislature required corroborative evidence in these affiliation cases in order to protect men against wicked or unfounded charges which might so easily be made if the evidence of the woman without corroborative testimony were sufficient; but it did not prescribe the material particular in which her evidence must be corroborated. It was said by the Court of Criminal Appeal in *Rex* v. *Baskerville* (3), when reviewing the law applicable to corroboration in criminal cases: "It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story. . . . is true." Whether or not a particular fact proved "shews or tends to shew" the truth of the complainant's story may be, as it is here, difficult to determine.

(1) [1891] 2 Q. B. 534, 538. (2) Ibid. 539.
(3) [1916] 2 K. B. 658, 667.

1920

THOMAS v. JONES.

Earl of Reading C.J.

In this case I come to the conclusion that there is, in law, evidence upon which the justices could decide that the respondent's testimony was corroborated in some material particular by other evidence. Each fact found by the justices as tending to corroborate the respondent's evidence may by itself be insufficient as corroboration; but the cumulative effect of the evidence, regarded not separately but collectively, may be, and I think in this case is, sufficient. I am not unmindful of the argument that this evidence is equally consistent with action dictated by kind and humane considerations; but I think the circumstances proved, taken in conjunction with the omission to answer the letter, are sufficient to justify the magistrate's decision. The question is one rather of the right inference of fact than one of law.

I do not clearly understand what is meant by the justices in referring to "the demeanour of the witnesses and the way the evidence was given by the respondent." Obviously her evidence, however well given, cannot be corroborative of her own story. Whether or not the demeanour of the appellant could in this case be conduct of the appellant amounting to corroborative evidence of her testimony I will not discuss, as I do not think there is sufficient material in the case stated to pronounce upon it. Had it been necessary to express an opinion I should have required the facts to be more fully stated. In arriving at my decision I have excluded from consideration the justices' statement as to the demeanour of witnesses, and for these reasons I refrain from discussing the dicta of Lord Dunedin and Lord MacLaren in the decisions cited to us. In my opinion this appeal should be dismissed with costs.

AVORY J. The question of law in this case is whether there was any evidence corroborating the evidence of the respondent, the mother of the child, in a material particular, within the meaning of the Bastardy Laws Amendment Act, 1872. The justices in the last paragraph of the case set out the facts which in their opinion afforded such corroboration. In addition to those facts, Mr. Davenport in his

argument has relied upon a fact not specifically mentioned by the justices in that paragraph, but possibly included in the expression "the demeanour of the witnesses," namely, that the appellant in the witness box denied that he had sent for the doctor. If that denial appears as a fact in the evidence I agree, subject to the observations I make on it hereafter, that it should be considered by the Court on this appeal, whether or not it was relied on by the justices. The corroborative evidence required by the statute must be evidence tending to prove that the appellant was the father of the child, or at least have some relation to the probability of his being the father: per Lord Alverstone C.J. in *Reffell* v. *Morton* (1); and if it is equally consistent with the conduct of a kind and humane employer towards his domestic servant, it does not, in my opinion, satisfy the requirements of the statute. I assent to Mr. Davenport's argument that the facts relied on as corroboration may be regarded collectively, though no one by itself may be sufficient, but in my opinion the facts relied on here, whether regarded singly or collectively, with the exception of the omission to answer the letter of July 14 and the alleged denial of sending for the doctor which I will deal with separately hereafter, are all entirely consistent with the conduct of a kind and humane employer, who being a bachelor, was placed in a difficult position, there being no evidence that the respondent had a home or a mother to go to, and that those facts do not point to the probability of the appellant being the father of the child. With regard to the omission to answer the letter of July 14, it must be observed that the appellant, who was the respondent's own witness, gave a reason for not doing so, which has to be considered in determining whether the omission can be construed as an admission of the paternity. Upon this question I think the judgments of the Court of Appeal in *Wiedemann* v. *Walpole* (2) are applicable: see particularly per Lord Esher M.R., where he says: "Suppose, however, the letter had charged against him some grievous offence or

(1) 70 J. P. 347.

(2) [1891] 2 Q. B. 534.

1920

THOMAS v. JONES.

AVORY J.

misconduct, and the writer had stated that unless the defendant paid something he would be exposed." That is precisely this case. "The argument, if true at all, must be that by not answering such a letter the man who receives it must be taken to admit that he is guilty of the charges contained in it." (1) Then Bowen L.J., after saying that silence is not evidence of admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not, goes on: "That appears to me good sense, and it is in substance the principle laid down by Willes J. in *Richards* v. *Gellatly*. (2) He says: 'It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected.'" (3) Then Kay L.J., dealing with the letter in that case, says: "Is it an irresistible inference that by declining to answer the letter he must be taken to have admitted the promise? His declining to answer is just as consistent with his not having made the promise as with his having made it. I cannot see that the mere fact of his declining to answer affords the corroborating evidence required by the Act of Parliament." (4) Even without the appellant's explanation, I think there were no circumstances in this case rendering it more reasonably probable that he would answer the charge; and, with his explanation, I think it would be unreasonable to expect him to answer it, having regard to the danger which experience teaches may arise from corresponding with a blackmailer. With regard to the alleged denial of sending for the doctor, if it clearly appeared that this was a deliberate untruth told by the appellant, it would be necessary to consider the opinions expressed in the Scotch cases which were quoted

(1) [1891] 2 Q. B. 537.
(2) (1872) L. R. 7 C. P. 127, 131.
(3) [1891] 2 Q. B. 539.
(4) Ibid. 541.

by Mr. Davenport; but, in my opinion, there is no such evidence of any deliberate untruth, and I content myself with saying that I should require further consideration before adopting those opinions which might, as it appears to me, lead to the conclusion that a disbelief of the evidence of the alleged putative father where it was in contradiction of that of the mother, would afford corroboration of her testimony. There remains to be considered the statement of the justices that they relied on the demeanour of the witnesses and the way the evidence was given by the respondent as corroboration of her evidence. This, in my opinion, can only mean that they believed the respondent and did not believe the appellant, and cannot be corroboration in some material particular. If it were, it would give rise to the very danger which, as Field J. said in *Cole* v. *Manning* (1), the statute was intended to prevent, namely, the danger of setting the evidence of a woman singly against that of a man singly in reference to a transaction which always takes place in secret. In my opinion this case is of a class in which it is peculiarly necessary that the requirements of the statute as to corroboration should be strictly complied with, and in my view there was no evidence, apart from that of the respondent herself, which was not consistent with the innocence of the appellant, or which tended to prove that he was the father of the child. I think the appeal should be allowed.

ROCHE J. In my opinion the appeal should be dismissed. The case is one of considerable difficulty, and having regard to the fact that Avory J. is of a different opinion I need hardly say that I feel diffidence in expressing my own; but having arrived at this conclusion which I have stated, I think it desirable to express shortly the grounds for my conclusion. The sole question in the appeal is whether the evidence of the mother was corroborated in some material particular by other evidence. If there was any corroboration in law, it was entirely for the justices to say whether they were satisfied with it in fact. The law as to corroboration

(1) (1877) 2 Q. B. D. 611.

1920

THOMAS v. JONES.

Roche J.

has been clearly and authoritatively explained in the judgment of the Lord Chief Justice in *Rex* v. *Baskerville*. (1) In the present case the corroborative evidence, which may be circumstantial, must be such as tends to show that the appellant was the father of the child in question. The evidence relied upon by the respondent and acted upon by the justices as corroborative, was evidence of a course of conduct on the part of the appellant. The respondent's case and evidence was that the appellant knew that the child was coming, and knew that he was the father, and acted accordingly before and after the birth. The appellant's case was that he had no such knowledge, and did not even know that the respondent was pregnant until the child was born. Apart from the evidence of the respondent, the witnesses were the appellant and one John Price. When the respondent's labour was approaching on May 11, and she became unwell in the early morning of that day, the appellant lit a fire, gave her brandy and tea, and sent for the doctor. The appellant admitted these facts, except that he altogether denied that he sent for the doctor. John Price proved, and the justices believed him as against the appellant, that the appellant sent him (John Price) for the doctor. No other facts or explanation appear to have been given or stated, as to the appellant's reason for summoning a doctor. He rested his case on that point on a denial of the fact. After the birth of the child on the same day (May 11th), the respondent and her child remained at the appellant's farm until June 17, a period of some five to six weeks. Her term of service was up on May 12. It was obviously impossible for the respondent to leave on that day, but the magistrates regarded the length of the stay permitted as a corroboration. It is I think obvious that no explanation was given to them such as the inability of the respondent to leave through ill-health. The magistrates also refer in this connection to the fact stated by the appellant in his evidence that he did not, during the period the respondent stayed, ask as to the paternity. I agree that absence of curiosity is in many

(1) [1916] 2 K. B. 658.

circumstances commendable, and certainly is no evidence of guilt, but unexplained it is not very natural, and with the other facts in this case I think the justices were entitled to regard it as some corroboration of the evidence that the appellant knew already all about the matter. So also with the fact that the appellant made no reply to the letter from the respondent dated July 14, plainly alleging his paternity. I accept to the full the statement of the law on this point in *Wiedemann* v. *Walpole* (1) by Bowen L.J.: "Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not." I think it more reasonably probable that an innocent man whose kindness had been abused, would in the present circumstances have answered the charge with a denial. Accordingly I hold the justices were justified in finding that there was corroborative evidence upon which they might act. My judgment, like that of my Lord, has proceeded independently of the finding of the justices as to demeanour of the witnesses, and independently of the fact that the appellant was held to have given untrue evidence at the hearing with regard to the doctor. Had it been necessary or proper to rely on these matters, the dicta of Lord Dunedin and Lord McLaren in the case of *Dawson* v. *M'Kenzie* (2) would have been in point and would have required careful consideration.

Appeal dismissed.

Solicitors for the appellant: *T. D. Jones & Co., for E. P. & A. Careless, Llandrindod.*

Solicitors for the respondent: *Churchill, Smallman & Co., for N. E. George, Newtown.*

J. F. C.

(1) [1891] 2 Q. B. 539. (2) 45 Sc. L. R. 473.

1920

March 15, 29.

GORE-BOOTH *v.* BISHOP OF MANCHESTER.

Ecclesiastical Law—Presentation—Fitness of Clerk—Practices of Ritual—Legality of—Jurisdiction of Common Law Court to determine—Right of Ordinary to require Discontinuance of Practices as Condition of Institution—Clercial Subscription Act, 1865 (28 & 29 *Vict. c.* 122), *ss.* 1, 9.

The patron of a benefice presented a clerk to the Bishop for institution. The Bishop having been informed that the clerk in his former church habitually practised the reservation of the Sacrament, the ceremonial use of incense, the use of candles on and above the Communion Table not required for light, and the wearing of certain eucharistic vestments, inquired of him whether that was the fact, and on his admitting that it was required him to undertake to discontinue those practices. The clerk, who denied the illegality of the practices, declined to give that undertaking, but expressed his willingness to subscribe the Declaration of Assent set out in s. 1 of the Clerical Subscription Act, 1865. The Bishop refused to institute him. In an action of quare impedit:—

Held, that the Bishop was entitled to interrogate the clerk as to his practices and to require him to discontinue them if they were illegal; that the Court had jurisdiction to determine the legality of those practices, and that it was not necessary to send the matter to the Archbishop for trial and certificate; that the three first of the said practices were illegal; that the clerk having refused to discontinue them was not a fit person; and that the Bishop was consequently justified in his refusal to institute him.

TRIAL of an action of quare impedit before Lord Coleridge J.

The plaintiff, Sir Josslyn Gore-Booth, is the patron of the rectory of Sacred Trinity, Salford. In March, 1918, the Rev. A. E. Cornibeer, the then rector, having expressed to the plaintiff his intention of resigning the living, the plaintiff offered it to the Rev. C. S. Carey, who accepted it. On April 5 the plaintiff wrote to the defendant, the Bishop of Manchester, that he had offered the living to Mr. Carey, and that the offer had been accepted, and in that letter he said: "Will you kindly send me a copy of the formal letter of appointment. Trusting that I have made a wise appointment, Yours faithfully," etc. At the date when that letter was written Mr. Cornibeer had not actually resigned; he did not in fact vacate the living till April 13. On April 8 the Bishop acknowledged that letter, and added: "I am making

the usual inquiries about Mr. Carey and if these are satisfactory I will ask my registrar to send you the form of presentation." On April 15 the Bishop wrote to Mr. Carey: "Having made inquiries I am informed that in your present church you use vestments and incense, altar lights in addition to the two lights, and reserve the Sacrament for the sick. If I am misinformed in these matters I should be glad to have your contradiction." In reply Mr. Carey told the Bishop that he had been correctly informed. On April 19 the Bishop wrote to Mr. Carey: "I shall be content if you will reply to this, my examination, in writing . . . . (1.) Eucharistic vestments having been introduced by the late incumbent of Sacred Trinity, Salford, without consulting either the congregation or the Bishop of the diocese, are you willing to discontinue the use of them till both consents have been obtained? (2.) Are you willing to undertake that you will not use incense, nor reserve the consecrated elements in Holy Communion until you are ordered to do so by the lawful authority for such use? (3.) Will you undertake not to use lights either above or on the Holy Table otherwise than as is allowed by the Lincoln judgment?" To that letter Mr. Carey, on April 24, replied: "I am of course prepared to make the legal declarations and to take the oaths required by law, but I am not able to enter into any undertaking other than the law requires as a condition of being instituted into the benefice." The Bishop then sent a copy of the above correspondence to the plaintiff, and asked if, under the circumstances, he intended to press his nomination of Mr. Carey. The plaintiff, on May 3, replied: "I would certainly wish to press my nomination of Mr. Carey." On May 13 the Bishop wrote to Mr. Carey that he must refuse to institute him to the benefice; and on May 16 he informed the plaintiff of that refusal. On August 7, 1918, the plaintiff sent to the Bishop a formal deed of presentation of Mr. Carey to the benefice of Sacred Trinity. At the end of November, 1918, the Bishop claimed that as the plaintiff had neglected to present a fit person within six months after the avoidance of the living his right of presentation had lapsed, and on

1920

GORE-BOOTH v. BISHOP OF MANCHESTER

December 1 he caused notice to be fixed on the door of the church that he intended to collate the Rev. J. R. Darbyshire to the benefice. The plaintiff then brought the present action against the Bishop and Mr. Darbyshire, claiming a declaration that the plaintiff was entitled to present a fit person, a declaration that the presentation of Mr. Carey on August 7 was valid, and an order upon the Bishop to institute him. He also claimed that the collation of Mr. Darbyshire was void, and an injunction restraining both defendants from proceeding with the institution of Mr. Darbyshire.

Talbot K.C., E. W. Hansell and *J. G. Wood* for the plaintiff. The plaintiff's right of presentation has not lapsed. The only presentation by the plaintiff was that of August 7, which was within the six months after the church became vacant on April 13. The notice to the Bishop on April 5 that Mr. Carey had accepted the living was not, and could not be, a presentation, for at that time the church was not vacant. In *Harris* v. *Austen* (1) it was said: "L'esglise doit estre void devant poet [sic] presenter car si l'esglise soit voidable nul presentation poet estre, mes si soit void en facto auterment est," citing *Smale's Case.* (2) "If the patron before the death of the incumbent makes letters of presentation, that is void, because he has no title to present": *Rud* v. *Bishop of Lincoln.* (3) It is not enough that the existing incumbent has given notice of intended resignation, the patron must wait till he has actually resigned. Moreover the letter of April 5 did not purport to be a presentation, it did not request the Bishop to institute, it only asked him to send the necessary document for the plaintiff to fill up. Then if the only presentation was on August 7 there was no such examination by the ordinary as would justify a refusal to institute. For the examination must be of a presentee; an examination before presentation will not suffice. The next point is that the Bishop had no right to inquire into the clerk's former

(1) (1616) 1 Rolle's Rep. 210, 213. (2) Y. B. 17 Edw. 3, 59, pl. 59.
(3) (1624) Hutton, 66.

practice in the matter of ritual; he had no power to require him to do more than comply with the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), and make the declaration of assent set out in s. 1, which includes a promise by the clerk that "in public prayer and administration of the Sacraments I will use the form in the said book prescribed," that is, in the Book of Common Prayer; and that declaration Mr. Carey was willing to sign. If there was a difference of opinion between the Bishop and the clerk as to what the form was that the Prayer Book prescribed, that was a matter for the Court and not for the Bishop to determine. Not only is the clerk, on presentation, required by s. 5 to subscribe the declaration of assent in s. 1, but by s. 9 he is not to be required to subscribe any other: "No person shall on or as a consequence . . . . of being presented . . . . to any benefice with cure of souls . . . . be required to make any subscription or declaration, or take any oath, other than such subscriptions, declarations, and oath as are required by this Act." But assume that the Bishop had power to inquire into the clerk's former practice, that practice does not show that he was unfit. The illegality of the practice is denied. It is conceded that *Heywood* v. *Bishop of Manchester* (1) is an authority that if the clerk in answer to questions by the Bishop refuses to discontinue practices of ritual which he does not dispute to be illegal, the Bishop may refuse to institute. But in that case, though the practices were the same as here (use of chasuble and alb, and of candles not required for light), their illegality was not disputed; here it is. And objection is taken to the jurisdiction of this Court to determine the question of that illegality. The proper course in quare impedit is to leave matters of doctrine and breaches of Ecclesiastical law to the Metropolitan. The Court which has to decide the sufficiency of the Bishop's plea of unfitness of the clerk is not necessarily the Court which has to determine the truth of the plea. "A plea founded upon unfitness must, in the first instance, show an unfitness which the Court" (of common law) "can recognise as a disqualification." If the truth of

(1) (1884) 12 Q. B. D. 404.

1920

GORE-BOOTH v. BISHOP OF MANCHESTER

the plea depends on matter of doctrine the Court "sends a writ to the Metropolitan, commanding him in the Queen's name to try the question, and to certify the result to the Court": per Willes J., *Bishop of Exeter* v. *Marshall.* (1)

Inskip K.C. and *Hon. M. Macnaghten K.C.* for the defendants. No particular form of presentation is required by law. It need not be by deed, it may be by word of mouth. It may be that the letter of April 5 was not valid as a presentation owing to the church being then full, but the later letter of May 3, in which the plaintiff expressed his wish to press the nomination of Mr. Carey, when read along with the letter of April 5, may properly be treated as a sufficient presentation, and on May 3 the church was vacant. Then if the presentation was valid it is open to the Bishop to show unfitness by reference to the correspondence that passed between him and the clerk at an earlier date. The question of unfitness is one for the Court to decide. Pollock B. took upon himself to decide it in *Heywood* v. *Bishop of Manchester* (2), and this Court is asked to follow that course.

[*Talbot K.C.* It is admitted that there are decisions that the wearing of a chasuble and alb and the ceremonial use of incense are illegal. The decisions as to lights are in conflict. All are open to review in the Ecclesiastical Courts, which Courts do not hold themselves bound by their own previous decisions.]

Reservation of the Sacrament was held to be illegal by the Dean of Arches in *Bishop of Oxford* v. *Henly.* (3) The chasuble and alb were held illegal by the Privy Council in *Hebbert* v. *Purchas* (4); and the ceremonial use of candles not for light was held illegal in *Sumner* v. *Wix* (5); *Martin* v. *Mackonochie.* (6) It is for this Court to decide upon the unfitness of the clerk. "In the plea in quare impedit it is not enough for the Bishop to say that he thought or even found, that the clerk presented was not a fit person; he must state positively that he was not a fit person, and must state

(1) (1863) L. R. 8 H. L. 17, 40.
(2) 12 Q. B. D. 404.
(3) [1907] P. 88.
(4) (1871) L. R. 3 P. C. 605.
(5) (1870) L. R. 3 A. & E. 58.
(6) (1868) L. R. 2 A. & E. 116.

in what respect he was not fit, with so much certainty and particularity as will enable the Court to judge whether the objection is one which, if true in fact, renders him unfit": per Blackburn J. in *Bishop of Exeter* v. *Marshall.* (1) There is no reported case in which the course has ever been adopted of sending the question of illegality to the Metropolitan. But even if questions of doctrinal unfitness are to be referred to the Metropolitan here the clerk has committed breaches of statutory and not merely of ecclesiastical law, for he has neglected to comply with the requirements of the Act of Uniformity of 1662 (13 & 14 Car. 2, c. 4). The Bishop here has followed the course adopted by his predecessor in *Heywood's Case* of giving the clerk the opportunity of reconsidering his opinions, but he declined to take it.

Talbot K.C. in reply.

Cur. adv. vult.

March 29. LORD COLERIDGE J. delivered the following written judgment:—

In this case the plaintiff, who is the patron of the rectory, church and benefice of Sacred Trinity, Salford, which became void on April 13, 1918, claims to have presented on August 7, 1918, the Rev. Christopher Saumarez Carey to the defendant, the Bishop of Manchester, as a fit person. He further alleges that the Bishop improperly and illegally refused to admit the presentee to the living, and wrongfully proceeded on December 1, 1918, to institute his own nominee, the Rev. John Russell Darbyshire, to the benefice. The Bishop replies that the plaintiff's presentee was not a fit person, that he was justified in refusing to institute, and that he was entitled to institute a fit person in his stead within six months after his refusal. The first point taken was that, the formal deed of presentation being dated August 7, no reply was received after that date from the Bishop refusing to appoint and assigning reasons, and that therefore the presentation held good.

The facts were as follows: On April 5 the plaintiff wrote to the Bishop stating that he had offered the living to

(1) L. R. 3 H. L. 33.

1920

GORE-BOOTH v. BISHOP OF MANCHESTER

Lord Coleridge J.

Mr. Carey, who had accepted it, and asking for a copy of a formal letter of appointment, adding: "Trusting I have made a wise appointment, Yours faithfully, Josslyn Gore-Booth." On April 8 the Bishop replied, thanking the plaintiff for his letter "informing me of the appointment of the Rev. C. S. Carey," and saying, "I am making the usual inquiries." Mr. Carey, in answer to questions put to him by the Bishop, admitted that he had habitually practised (1.) the reservation of the Sacrament, (2.) the ceremonial use of incense, (3.) the lighting of candles on and above the Communion Table not required for the purpose of giving light, (4.) the wearing of vestments, and refused to undertake to discontinue these practices. On April 27 the Bishop communicated these facts to the plaintiff, and asked whether he intended to press his nomination. On May 3 the plaintiff by letter pressed his nomination on the Bishop, who thereupon on May 13 refused to institute. It is established law that a presentation need not be by deed; a letter fulfilling the requisites will suffice; and on these facts I find that although the letter of April 5, standing alone, was premature, the living not being void, that letter being read with the letter of May 3 constituted an effective presentation, and that, the plaintiff being informed at the time by the Bishop of his grounds for refusing to institute, if those grounds were valid the plaintiff could not insist on the institution of his nominee. I hold, therefore, that this objection fails. The next point taken was that the Bishop had no right to put the questions he did to the clerk, or to require him to promise to discontinue. Assuming that the practices were illegal, and that if habitually followed by the clerk they constituted good ground for his being unfit, the questions put as to the past were necessary to ascertain the facts. The questions put as to the future were in the interest of the clerk. It might be unjust to the clerk to ascribe to him unfitness on the ground of practices in the past if he undertook to do nothing in future in this regard to render himself unfit. The matter was discussed in *Heywood* v. *Bishop of Manchester* (1), and I desire to follow,

(1) 12 Q. B. D. 404.

on this point, the decision of the Court. It was also urged that because the clerk undertook to give an undertaking in the terms of the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 5, no further undertaking could be required of him. This is to trifle with common sense. The Bishop knew that the clerk construed the declaration as not inconsistent with the practices. The Bishop considered them illegal; the clerk did not, and the declaration would therefore be an idle form. If they were illegal the Bishop was entitled to security against their repetition. Another point was taken that the Bishop was precluded in this case by inconsistency in requiring the abandonment of these practices. The only ground on which such evidence would be receivable would be in order to impugn the good faith of the Bishop. That good faith is here expressly admitted. Whether the Bishop has or has not thought fit in other cases to extort obedience to similar requirements is beside the mark. It does not alter the legality or illegality of these practices, which is a question of law affecting property. Assuming inconsistency on the part of the Bishop and illegality in the practices, it would only be an instance to verify the saying of Pope: "A man should never be ashamed to own he has been in the wrong, which is but saying, in other words, that he is wiser to-day than he was yesterday." Although I have excluded evidence on this head, it must not be inferred that the Bishop has in fact been guilty of any inconsistency in the matter. It was also urged that I am not competent to decide whether the admitted practices are illegal, and that I must refer this question to the Metropolitan or some other ecclesiastical authority. I express no opinion as to whether it would or it would not be incumbent on me to do so in the case of an investigation as to heresy. This is not a question of heresy, but of practice. The opinion of the clerk on questions of doctrine is not challenged. It may be that some inference as to doctrine may be inferred from the practice. But if the practice be legal, the fact that some heretical opinion may be inferred from it does not make it illegal. And if the practice be illegal, the fact that only an orthodox doctrine can be inferred from

1920

GORE-BOOTH v. BISHOP OF MANCHESTER

Lord Coleridge J.

it will not make it legal. I have to decide on the basis of law whether the practice be legal or not. I have also to decide whether, if illegal, the person so practising is a fit person. If the person has so practised he is not a fit person. This may reasonably be said to be beyond controversy. I therefore turn to consider the practices. The plaintiff alludes to the decisions of the Judicial Committee of the Privy Council, and discounts them in advance by arguing that, unlike Courts of common law, they do not consider themselves in these cases bound by their own decisions, which argument a reference to those decisions appears to support. Apart from the question whether in a suit of quare impedit this Court is irrevocably bound by those decisions, which, although of course great weight should be attached to them, I am not prepared to concede, the fact that the Judicial Committee does not think itself bound by its own decisions is an argument to show that neither am I bound by them, although, as I have said, great weight must attach to its authority. Indeed, in the case of *Smith* v. *Brown* (1), it was held, overruling the case of *The Beta* (2), that the Judicial Committee of the Privy Council, as an Appellate Tribunal forming a branch of the Court of Admiralty, could be the subject of prohibition. But it will be seen before I close that the determination of this point is not necessary to my judgment. In the case of *Heywood* v. *Bishop of Manchester* (3), the fact whether the practices complained of were or were not illegal was not strenuously argued. Pollock B. says: "In considering whether the acts done would have been good ground for deprivation had they been done by a rector, I may say that this was almost admitted to be so by the plaintiff's counsel; at least, no authority was cited before me to the contrary." The learned judge was not apparently asked to take the proper legal means of ascertaining whether all or any of the practices complained of were or were not legal, and he did not apply his mind to that point. The conflicting decisions were not quoted. He assumed illegality on the authority

(1) (1871) L. R. 6 Q. B. 729. (2) (1869) L. R. 2 P. C. 447.
(3) 12 Q. B. D. 404, 418.

of *Hebbert* v. *Purchas* (1) and *Ridsdale* v. *Clifton*. (2) Nor was he asked to review those decisions, nor was it argued that the Court was bound by them so as to prevent review. Probably it was realized that some of the practices were clearly illegal, and therefore the case was argued on other grounds. Here all the alleged illegalities are strenuously asserted to be legal. I do not think, therefore, that the case of *Heywood* v. *Bishop of Manchester* (3) precludes my examining into the practices with a view to pronounce on their legality or otherwise. As the illegality of these practices is contested by the plaintiff, I feel bound to decide this question for myself, so far as it is necessary for me to determine whether the action of the Bishop was or was not justified.

1. Reservation of the Sacrament. By art. 25 "The Sacraments were not ordained by Christ to be gazed upon or to be carried about, but that we should duly use them"—that is to say, that to gaze upon or to carry about the Sacraments is to unduly use them for a purpose which Christ has not ordained. And art. 28 uses similar language: "The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." And what is the due use? We have it in the rubric, which has a statutory force: "If any remain of that which was consecrated it shall not be carried out of the Church, but the Priest and such other of the Communicants as he shall then call unto him shall, immediately after the Blessing, reverently eat and drink the same." The Order for the Communion of the Sick enjoining reservation contained in the First Prayer Book of Edward VI. was omitted in every subsequent Prayer Book, no doubt of set purpose. Every clerk is required to promise that in the administration of the Sacrament he will use the form prescribed in the Prayer Book and none other, except so far as shall be otherwise ordered by lawful authority. There is no order prescribing or permitting reservation in the Prayer Book; it has not been authorized by any lawful authority, and I am of opinion that the clerk, in habitually

(1) L. R. 3 P. C. 605. (2) (1877) 2 P. D. 276.
(3) 12 Q. B. D. 404.

1920

GORE-BOOTH v. BISHOP OF MANCHESTER

Lord Coleridge J.

practising reservation, was guilty of an illegal practice. My view on this point is confirmed by the opinion of Archbishop Temple, given on May 1, 1900, by *Kensit* v. *Rector of St. Ethelburga* (1) and by the Arches Court of Canterbury in *Bishop of Oxford* v. *Henly*. (2)

2. The ceremonial use of incense. By s. 13 of the Act of Uniformity of 1662 it is enacted that no rites or ceremonies shall be openly used in any church other than what are prescribed and appointed to be used in and by the Prayer Book. The ceremonial use of incense is nowhere prescribed in the Prayer Book. The ceremonial use of incense is neither an ornament of the church nor of the minister. It is not, therefore, included in the Ornaments rubric. The object of the Act of Uniformity of 1662 was to prevent divergence of ceremonies. Ceremonies not prescribed are thereby inferentially forbidden. And although matters ceremonial of no importance, though technically illegal, may at discretion be overlooked, this ceremony is of importance, as is shown incidentally by the clerk refusing to abandon it. If it were of no importance no sensible clerk would insist upon it. The Bishop likewise considers it of importance. Neither party can be heard to say it is a trifling matter. I cannot therefore thus dismiss it. As used by the clerk in this case it is admitted to be a ceremony. It does not come within the distinction which has been drawn between incense used as the ceremonial part of a service and incense not so used. It being admitted that the ceremonial use of incense has been practised, I adopt on this point the learned judgment of Sir Robert Phillimore in *Martin* v. *Mackonochie* (3), confirmed as it has been by the opinion of the two Archbishops pronounced on July 31, 1899, and I decide that its ceremonial use is illegal.

3. The lighting of candles on and above the Communion Table which was not required for the purpose of giving light. The same arguments apply here as in the case of the ceremonial use of incense. If the candles are not lit for the purpose of

(1) [1900] P. 80. (2) [1907] P. 88.
(3) L. R. 2 A. & E. 116.

lighting but for a ceremonial use the arguments applicable to the ceremonial use of incense apply equally to this practice. The primary object of candles is to give light. It is admitted these candles were not used for that purpose. The only alternative purpose for which they could conceivably be used was ceremonial, and it is not necessary to repeat what I have already said on this subject in dealing with this ceremony. The ceremonial use of candles was condemned in *Martin* v. *Mackonochie* (1), and that case on this point was not overruled in *Read* v. *Bishop of Lincoln* (2), and I am of opinion that such use was illegal, and I am confirmed in this view by the opinion of Archbishop Temple, given on May 1, 1900, by *Kensit* v. *Rector of St. Ethelburga* (3), and by the Arches Court of Canterbury in *Bishop of Oxford* v. *Henly.* (4)

4. The wearing of a chasuble and alb. The rubric of the First Prayer Book of Edward VI., 1549, which was set up by lawful authority of Parliament by 2 & 3 Edw. 6, c. 1, and thus became the statutory rubric of the statutory Prayer Book, ordained as follows: "Upon the day and at the time appointed for the ministration of the Holy Communion the Priest that shall execute the Holy Ministry shall put upon him the vesture appointed for that ministration—that is to say, a white alb plain, with a vestment or cope." In the Second Prayer Book of Edward VI., 1552, a surplice was substituted for the alb vestment or cope. By the Act of Uniformity (1 Eliz. c. 2) the rubric of the First Prayer Book of Edward VI. was revived until other order was taken by authority of the Queen's Majesty. In 1566 Queen Elizabeth issued advertisements, which are said to be an "order" under the Act of Uniformity, dealing with the vestments of ministers, and ordering that every minister saying any public prayers or ministering the Sacraments or other rites of the Church should wear a comely surplice with sleeves. Finally, the rubric of 1662, which is now in use, and is of statutory authority, enacts: "And there it is to be noted that such ornaments of the Church and of the Ministers thereof at all

(1) L. R. 2 P. C. 365.
(2) [1892] A. C. 644.
(3) [1900 P. 80.
(4) [1907] P. 88.

1920

GORE-BOOTH v. BISHOP OF MANCHESTER

Lord Coleridge J.

times of their ministration shall be retained and be in use as were in this Church of England, by the Authority of Parliament in the Second Year of the reign of King Edward VI." There never has been any doubt that these words refer to the First Prayer Book of Edward VI., and that the ornaments of the ministers is a reference to their vesture. The case of *Westerton* v. *Liddell* (1) thus held, and in *Martin* v. *Mackonochie* (2) the Court on this point approved the reasoning in *Westerton* v. *Liddell.* (1) But the Court came to an opposite conclusion in *Ridsdale* v. *Clifton* (3), approving *Hebbert* v. *Purchas* (4), and declared that the rubric of the Prayer Book of 1662 does not mean what apparently it says. It apparently says that the vestments therein prescribed for the celebrant at Holy Communion shall be a white alb plain with a vestment or cope, and therefore that no other garment is lawful. But the Court held that to mean that a comely surplice with sleeves shall be the only lawful garment on such occasions, because the law had been altered since the First Prayer Book of Edward VI. By the ordinary rules of construction prevailing in this Court, where a statute is unambiguous in language and free from all difficulty as to construction, this Court does not admit argument as to intention or policy other than that which the words themselves import, and a statute impliedly repeals all former statutes inconsistent with its express enactments. This is true especially in the case of a penal statute. To construe a statute otherwise is to legislate and not to interpret, and to let a legal decision be governed by policy. Desuetude, if a clerk were accused of illegality in not wearing the vestments prescribed, might well be pleaded. But if the wearing of such vestments had been abandoned, it would be a difficult thing to accuse a clerk of illegality for wearing them, if they had in 1662 been made lawful, and that Act had not been repealed. Ecclesiastical storms have hurtled round this controversy, which has been fought with an extreme oppugnancy. Happily, in this case, I am not constrained to pronounce my opinion upon it. I

(1) (1857) Moore's Special Report.
(2) L. R. 2 P. C. 365.
(3) 2 P. D. 276.
(4) L. R. 3 P. C. 605.

have only to decide whether the plaintiff did or did not present a fit person in law, and whether consequently the Bishop was or was not bound to institute the person so presented. There my function ends. I can rest, therefore, my judgment upon other grounds.

In conclusion, therefore, I find that there was a valid presentation to the living on May 3, 1919; that the Bishop refused to institute the clerk presented on May 13, 1919; that the Bishop duly informed the plaintiff of his grounds for refusal to institute; that the Bishop had a right to interrogate the clerk as to his practices, and, if they were illegal, to demand that they should be discontinued; that on any view three out of the four practices were illegal; that the clerk, having admitted to have habitually used these practices and refused to discontinue, was not a fit person; that the Bishop was, in consequence, not bound to institute Mr. Carey; that the Bishop had a right to institute his own nominee; and that judgment must be for the Bishop, with costs.

Judgment for the defendant.

Solicitors for the plaintiff: *Brooks, Jenkins & Co.*
Solicitors for the defendant: *Bridges, Sawtell & Co.*

J. F. C.

C. A.

1920

Jan. 30;
Feb. 6;
Mar. 30.

[IN THE COURT OF APPEAL.]

In re GUNSBOURG.

Bankruptcy—Fraudulent Transfer—Transfer of Assets by Bankrupt to Company formed by Him—Act of Bankruptcy—Subsequent Transfer to bona fide Purchaser for Value without Notice—Relation back of Trustee's Title—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*b*).

On September 20, 1917, a debtor transferred his assets, including certain furniture, to a company formed by him. On September 27 he committed an act of bankruptcy upon which a petition was presented on October 8, and a receiving order was made against him on October 24, followed by an adjudication on December 12. After the date of the receiving order part of the furniture was sold by the company to a bona fide purchaser for value without notice, by whom it was resold to another purchaser in the same position. On February 3, 1919, the transfer of September 20, 1917, was held to be fraudulent and void and an act of bankruptcy, and the company was ordered to deliver to the trustee all the property comprised in that sale. The value of the property having been found by the Registrar, a further order was made against the company to pay the amount of that value to the trustee. No payment having been made under that order the trustee claimed to recover the furniture or its value from the ultimate purchaser:—

Held, (1.) on the authority of *Brinsmead* v. *Harrison* (1871) L. R. 6 C. P. 584, that the judgment against the company being unsatisfied, the trustee was not precluded from proceeding against the purchaser to recover the furniture; and (2.) by Lord Sterndale M.R. and Warrington L.J. (Younger L.J. dissenting) that the title of the trustee related back to the act of bankruptcy of September 20, 1917, and that neither the original nor any subsequent transferee could establish any title as against the trustee.

Decision of Horridge J. affirmed.

APPEAL from a decision of Horridge J.

On September 19, 1917, the bankrupt, A. Gunsbourg, caused to be incorporated a company under the name of A. Gunsbourg & Co., Ld., and on September 20, 1917, he transferred assets, including certain furniture, the subject-matter of these proceedings, to that company. On September 27 he committed the act of bankruptcy upon which he was subsequently adjudicated. On October 8 a petition was presented, on October 24 a receiving order was made, and on December 12, 1917, the adjudication followed.

On February 3, 1919, Horridge J. declared that the transfer of September 20 was fraudulent and void so as to be an act of bankruptcy under s. 1, sub-s. 1 (*b*), of the Bankruptcy Act, 1914, but did not declare it to be a fraudulent conveyance under the statute 13 Eliz. c. 5: *In re Gunsbourg.* (1) By the same order he directed A. Gunsbourg & Co., Ld., to hand over to the trustee all the property contained in the transfer of September 20, 1919, or pay the value of any part not handed over.

On July 31, 1919, the learned judge ordered that the Registrar should report of what the property to be accounted for under the order of February 3 consisted, and what was the value of such property. On August 22, 1919, the Registrar reported that the value of the property was 808*l.* 1*s.* 6*d.*, and on September 24, 1919, Greer J. ordered that A. Gunsbourg & Co., Ld., should forthwith pay that sum to the trustee.

In or about the end of September, 1917, a company called the Croydon Aviation and Engineering Co., Ld., took possession of four rooms in the office of A. Gunsbourg & Co., Ld., on the second floor of Effingham House, Arundel Street, Strand. Subsequently to the date of the receiving order the Croydon company purchased the furniture belonging to A. Gunsbourg & Co., Ld., which was in the four rooms which they took over.

On December 11, 1918, the liquidator of the Croydon company sold to a Mr. Maschonas the furniture purchased from A. Gunsbourg & Co., Ld., and in February, 1919, Mr. Maschonas sold it to the Anglo-Hellenic Banking and Commercial Co., Ld., who resold a portion of it to the Dock, Wharf, Riverside and General Workers' Union for the sum of 218*l.* 12*s.* which was now standing to their credit in the London County Westminster & Parr's Bank, Ld.

On October 3, 1919, the trustee moved before Horridge J. for a declaration that the furniture and effects in or upon the premises of the Anglo-Hellenic Bank and the sum of 218*l.* 12*s.*, formed part of the property of the bankrupt.

(1) (1918–19) B. & C. R. 108; 88 L. J. (K. B.) 562.

C. A.

1920

GUNSBOURG, *In re*

At the hearing two objections to the motion were taken on behalf of the respondents: (1.) that the trustee was in some way estopped, he not having interfered between the dates of the adjudication and the bringing of the motion; (2.) that the trustee on September 24, 1919, had obtained an order from Greer J. against Gunsbourg & Co., Ld., for payment of the value of the furniture transferred to them. As to the first point, Horridge J. held that there was no evidence of any act done by the trustee which could prevent his asserting his title, and that the delay was not sufficient to in any way estop him, especially having regard to the fact that in the meantime he had taken proceedings to get the transfer declared void. As to the second point the learned judge held that the trustee had separate and not alternative rights against any person dealing with his property, and those rights were not such as to raise any question of election between the various parties responsible: *Scarf* v. *Jardine.* (1) He also held that the trustee could not be paid twice over, and could only recover from the respondents to the motion in respect of the value of any furniture which he had not been paid for under the order of Greer J. Counsel for the trustee urged that as the purchases by the Croydon company from Gunsbourg & Co., Ld., were after the date of the receiving order no title could pass to them or the subsequent assignees, but in the opinion of the learned judge the answer to this was that the transfer to Gunsbourg & Co., Ld., under whom they all claimed, was made before the receiving order, and the real question to be decided in this case was whether or not bona fide purchasers, without notice of the invalidity of Gunsbourg & Co.'s title (as he found the Croydon company, Mr. Maschonas and the Anglo-Hellenic Bank on the facts of this case to be) acquired any title as against the trustee in bankruptcy.

The judgment of Horridge J. then proceeded as follows: This last point seems to be a very difficult one. On behalf of the trustee it was argued that inasmuch as the transfer to Gunsbourg & Co., Ld., was an act of bankruptcy and

(1) (1882) 7 App. Cas. 345.

C. A. 1920

GUNSBOURG, *In re.*

therefore void, no title could be acquired from Gunsbourg & Co., Ld., by any bona-fide purchaser for value. *In re Vansittart* (1) and *In re Brall* (2) seem to me to decide that where there has been no act of bankruptcy committed prior to the assignment to a bona-fide purchaser for value from a person in whose favour a voluntary settlement has been made, the trustee cannot intervene under s. 42 of the Bankruptcy Act, 1914, to the prejudice of such bona-fide purchaser, and *In re Hart. Ex parte Green* (3) extends protection to a bona-fide purchaser in a case where an act of bankruptcy has been committed between the making of the voluntary settlement and the bona-fide purchase for value. These three cases are all cases dealing with voluntary settlements and, no doubt, the main ground of decision was that the voluntary settlement section does not make the transaction void but only voidable, and that subsequent transactions for value prevent its being avoided. There is no question in this case of applying s. 42, but it was argued before me that under s. 37 the title of the trustee by relation vested in him all the property of the bankrupt at the time of the commission of the first act of bankruptcy committed within three months of the presentation of the petition, which in this case was the assignment of September 20, 1917, and that the assignment being void as an act of bankruptcy, no purchaser for value could obtain any rights. It is quite clear that the case of a bona fide purchaser for value from the assignee under a fraudulent assignment is not within the protection afforded by s. 45, as that section deals exclusively with transactions between the bankrupt and other persons. If a bona fide purchaser is to be protected in this case it must be by the application of the equitable doctrine which protects purchasers for value without notice in certain cases.

In *In re Slobodinsky* (4) Wright J. says: "There is much greater difficulty in cases like those which are now in question, where the trustee's title is established by relation

(1) [1893] 2 Q. B. 377.
(2) Ibid. 381.
(3) [1912] 3 K. B. 6.
(4) [1903] 2 K. B. 517, 532.

C. A. 1920

GUNSBOURG, *In re.*

back and the statute contains no applicable exception. It is, indeed, sufficient to refer to cases like *Copland* v. *Stein* (1) and *Nunes* v. *Carter* (2) in order to show that an alienee, however innocent, was not aided at law except in the cases specified by the statutes for the time being in force. Equity, however, did not altogether refuse relief: see *Abery* v. *Williams* (3); *Collett* v. *De Gals* (4); *Latouche* v. *Lord Dunsany* (5); *Wilkes* v. *Bodington* (6); and it may be that at the present day it would be right to apply or even extend the equitable doctrine." In the judgment of the Master of the Rolls in *In re Hart, Ex parte Green* (7), he says: "The Courts of equity have for centuries refused to grant relief against a purchaser for value without notice in whom or in a trustee for whom a legal title is vested." A good illustration of this is found in *Wilkes* v. *Bodington*. (6) On turning to the report of that case I find there a settlement for value was executed long after an act of bankruptcy, and the Lord Chancellor decided in favour of the purchaser for value. I find that at p. 203 of the 11th ed. of Williams on Bankruptcy, a portion of the work as originally written by the late Vaughan Williams L.J. shows that at the time of the matter dealt with in *Wilkes* v. *Bodington* (6) the doctrine of the trustee's title relating back was applicable and in fact was much more extensive than at the present time.

I think therefore I can consider *Wilkes* v. *Bodington* (6) as an authority for the proposition that in a case where no question arises as to a voluntary settlement but where the trustee relies on the doctrine of relation back, that doctrine must be qualified by an exception in favour of a purchaser for value without notice. It was however said that even if this be so the doctrine cannot be applied in any case where the transfer itself is an act of bankruptcy, and reliance was placed on the language of Vaughan Williams J. in *In re Vansittart* (8) and *In re Brall* (9) where he sets out that the

(1) (1799 8 T. R. 199.
(2) (1866) L. R. 1 P. C. 342.
(3) (1681) 1 Vern. 27.
(4) (1734) Cas. *t.* Talb. 65.
(5) (1803) 1 Sch. & Lef. 137.
(6) (1707) 2 Vern. 599.
(7) [1912] 3 K. B. 6, 11.
(8) [1893] 2 Q. B. 377, 380.
(9) [1893] 2 Q. B. 381, 383.

necessity for the proviso protecting bona fide purchasers, where there has been a fraudulent preference, arose from the fact that the fraudulent preference was in itself an act of bankruptcy. I think I must read these observations as meaning that when a purchaser for value takes his title through a document which is in itself an act of bankruptcy, it is necessary, in order that he may be protected, to have a clause in the Act similar to the one now contained in s. 44, sub-s. (2), of the Bankruptcy Act, 1914.

I have not overlooked *Shears* v. *Goddard* (1), where it was held that the transaction which came within the express provisions of s. 49 of the Bankruptcy Act, 1883, was none the less protected because it was an act of bankruptcy. That case turned on the express words of the section protecting transactions between a bankrupt and third parties, and I do not think I can, having regard to the language of Vaughan Williams J., extend the equitable protection given to a bona fide purchaser for value in a case where the transaction is itself an act of bankruptcy and there is no protecting provision. The language of Vaughan Williams J. shows that he would have come to the same conclusion as the Court of Appeal under the protective provision with regard to fraudulent preference, but it also shows that in the absence of that provision, which he says is necessary, a bona fide purchaser would not be protected in the case of a fraudulent preference which was an act of bankruptcy.

For these reasons I think the motion succeeds.

I am only dealing with a case where the title is acquired through a conveyance which is itself an act of bankruptcy and not with a conveyance made subsequently to the act of bankruptcy which may, having regard to the decision in *Wilkes* v. *Bodington* (2), stand in a different position.

The declaration can only be made as to the furniture now in the possession of the Anglo-Hellenic Bank which formed a portion of the original sale by Gunsbourg & Co., Ld., and inquiries must be taken as to (1.) what portion of the furniture now on the premises was included in the original

(1) [1896] 1 Q. B. 406. (2) 2 Vern. 599.

C. A. 1920

GUNSBOURG, *In re.*

assignment of September 20 to Gunsbourg & Co., Ld.; (2.) What portion of the sum of 218*l.* 12*s.* represents furniture included in the assignment.

The Anglo-Hellenic Bank appealed.

Tindale Davis for the appellants. The question on this appeal is whether the appellants' title, as bona fide purchasers for value without notice, can be upset by the trustee in bankruptcy on the ground that his title must be taken to have accrued before the date of the transfer to them.

Sect. 45 of the Bankruptcy Act, 1914 (the protection section) deals only with transactions with the bankrupt direct and does not touch the question as to the protection of an assignee or transferee from some person other than the bankrupt. The submission is that although the appellants do not come within the protection of s. 45, yet inasmuch as they are innocent purchasers from an innocent purchaser they are protected by the equitable doctrine.

[LORD STERNDALE M.R. Is not the question whether this property, at the time the bankrupt sold it, was by virtue of the relation back of the trustee's title the property of the trustee? The equitable doctrine only applies when the bona fide purchaser has the legal title. Here, if the furniture was the property of the trustee at the time of the purported sale by the bankrupt, the subsequent purchaser for value could get no title at all.]

In *In re Hart, Ex parte Green* (1) it was held that a purchaser for value from the donee under a voluntary settlement without notice of an act of bankruptcy committed by the settlor was entitled to hold the property as against the trustee in bankruptcy of the settlor even though the purchase was subsequent to the act of bankruptcy to which the title of the trustee related back.

[YOUNGER L.J. That can only apply to chattels where the purchaser acquires them in market overt.]

I rely particularly upon the judgment of Kennedy L.J. in that case. The position is this. Prior to the transfer to the

(1) [1912] 3 K. B. 6.

company the legal title was in the debtor, and it passed to A. Gunsbourg & Co. on the transfer. The chattels belonged to the company until the bankruptcy of the debtor. The transfer could only be attacked in the event of bankruptcy. The transfer to the company was voidable only and not void. I rely upon the view expressed by Wright J. in *In re Hirth* (1) which was not overruled on appeal although the appeal was allowed.

[*Wilkes* v. *Bodington* (2), *Halifax Joint Stock Banking Co.* v. *Gledhill* (3), *Shears* v. *Goddard* (4), *In re Jukes* (5), *In re Slobodinsky* (6) and *In re Goldburg* (7) were also referred to.]

It is submitted moreover that the trustee, having elected to obtain the order for payment against A. Gunsbourg & Co., has affirmed the sale and is precluded from proceeding to recover the furniture from the appellants. *Scarf* v. *Jardine* (8) is not against my contention on that point.

Comyns Carr for the trustee in bankruptcy. There is in such a case no election by the trustee unless and until he has obtained execution and satisfaction: *Ex parte Drake* (9); *In re Scarth.* (10) Until execution and satisfaction the property in the goods does not leave the original owner.

[LORD STERNDALE referred to Bullen and Leake's Precedents of Pleading, 7th ed., p. 762.]

There judgment without execution is not satisfaction, and mere recovery in trover does not change the property in the goods: *Brinsmead* v. *Harrison* (11); *Buckland* v. *Johnson* (12); *Marston* v. *Phillips.* (13)

In the old action of detinue the judgment was for damages, but the defendant could deliver the goods in lieu of damages. In modern times the judgment is for delivery of the goods or payment of their value as damages in default.

(1) [1899] 1 Q. B. 612.
(2) 2 Vern. 599.
(3) [1891] 1 Ch. 31.
(4) [1896] 1 Q. B. 406.
(5) [1902] 2 K. B. 58.
(6) [1903] 2 K. B. 517.
(7) [1912] 1 K. B. 384, 389.
(8) 7 App. Cas. 345.
(9) (1877) 5 Ch. D. 866.
(10) (1874) L. R. 10 Ch. 234.
(11) L. R. 6 C. P. 584; (1872) 7 C. P. 547.
(12) (1854) 15 C. B. 145, 160.
(13) (1863) 9 L. T. 289.

C. A. 1920

GUNSBOURG, *In re.*

Horridge J. was wrong in holding on the facts that the appellants were bona fide purchasers without notice.

The onus is on the appellants: *Ex parte Schulte* (1); *In re Robinson.* (2) On the main issue none of the cases go further than this, that in certain circumstances the Court of equity would not interfere to assist the trustee in bankruptcy as against a bona-fide purchaser. All the cases relied upon in *In re Slobodinsky* (3) were negative.

Here the transaction is absolutely void and not merely voidable as in *In re Hart, Ex parte Green.* (4) Where there is relation back of the trustee's title the bankrupt is a stranger to the goods and any transaction whereby he affects to deal with them is worthless and ineffectual. The application of the equitable doctrine was abandoned by the Court in view of the fact that the Court of Bankruptcy had jurisdiction to ascertain the facts for itself: *Ex parte Herbert.* (5) In *In re Vansittart* (6), *In re Brall* (7) and *In re Carter and Kenderdine's Contract* (8) the Court was dealing with cases very different from the present case. The transaction is void as from the accruer of the trustee's title, and no dealing with a donee under it can be supported as against the title of the trustee. See also *Stevenson* v. *Newnham.* (9)

Tindale Davis in reply. The trustee has two remedies: (1.) against the goods, (2.) against their value. He has chosen to have the value assessed, and has obtained an order for payment of that assessment. He cannot now assert his remedy against the goods: *Vernon* v. *Hanson* (10); *Smith* v. *Baker* (11); *Buckland* v. *Johnson.* (12)

Sect. 45 of the Bankruptcy Act, 1914, is limited to dealings with the bankrupt himself. *In re Hart, Ex parte Green* (4) extended the protection to a bona-fide purchaser for value from a donee. *Ex parte Schulte* (13) turned entirely on the

(1) (1874) L. R. 9 Ch. 409.
(2) [1911] 1 Ch. 230.
(3) [1903] 2 K. B. 517.
(4) [1912] 3 K. B. 6.
(5) (1806) 13 Ves. 183.
(6) [1893] 2 Q. B. 377.
(7) Ibid. 381.
(8) [1897] 1 Ch. 776.
(9) (1853) 13 C. B. 285.
(10) (1788) 2 T. R. 287.
(11) (1873) L. R. 8 C. P. 350.
(12) 15 C. B. 145, 161.
(13) L. R. 9 Ch. 409.

then existing section corresponding to s. 45. Horridge J. has found on the evidence that the appellants are bona-fide purchasers for value without notice. They are not protected by s. 45 and are entitled to the protection which was given by the Court in *In re Hart, Ex parte Green.* (1)

Cur. adv. vult.

March 30. LORD STERNDALE M.R. (after stating the facts, and accepting the finding of Horridge J. that the purchase by the appellants was made in good faith and for value). The important question in the case is whether in those circumstances the purchasers are by any principle of law or equity protected against the claim of the trustee whose title relates back to the first sale to A. Gunsbourg & Co., through whom the title, if any, comes to them. There is however a preliminary point which must be considered first. It arises in the following circumstances: On February 3, 1919, Horridge J. made an order declaring the agreement for sale to A. Gunsbourg & Co. fraudulent and void as against the trustee and an act of bankruptcy under s. 1, sub-s. (1) (*b*), of the Bankruptcy Act, 1914, and ordered A. Gunsbourg & Co. to hand over to the trustee all the property contained in the said agreement or pay the value of any part not handed over. After some other proceedings Horridge J., on July 31, 1919, ordered that the registrar should report of what the property to be accounted for according to the order of February 3, 1919, consisted, and what was the value of such property. On August 22, 1919, the registrar reported that the value of the property was 808*l.* 1*s.* 6*d.*, and on September 24, 1919, Greer J. ordered that A. Gunsbourg & Co., Ld., should forthwith pay to the trustee the sum of 808*l.* 1*s.* 6*d.* It was contended that by taking this order the trustee was precluded from taking proceedings against the Anglo-Hellenic Co. to recover the furniture in their possession or the proceeds of what they had sold because he had elected to take an order for payment against A. Gunsbourg & Co. For the purposes of

(1) [1912] 3 K. B. 6.

C. A. 1920

GUNSBOURG, *In re.*

Lord Sterndale M.R.

this point it must be assumed that the Anglo-Hellenic Co. have property of the trustee and are wrongfully detaining it from him. If this be so I think it is clear that he has done nothing to prevent him from suing them in detinue or trover.

The order he has obtained amounts to no more than judgment in detinue or trover for the value of the goods and it has not been satisfied. It has been clear law since the case of *Brinsmead* v. *Harrison* (1) that such a judgment unsatisfied does not operate to transfer the property to the person against whom judgment was obtained or prevent the true owner from suing a third person not the original wrongdoer for the return of the plaintiff's goods which that third person continues to detain from him. That was the exact point determined upon the new assignment in *Brinsmead* v. *Harrison* (1) and that decision is conclusive against the appellants on this point.

The other point is much more important and more difficult. Prima facie these goods, being the bankrupt's property, passed to the trustee at the moment of the transfer to A. Gunsbourg & Co., as that transfer was an act of bankruptcy committed within three months of the receiving order, and the trustee's title related back to the moment of its taking place. It was argued on the part of the appellants that though there was a relation back of the trustee's title, that title did not accrue until he had obtained an order declaring the transfer to be an act of bankruptcy, and, as I understood the argument, that notwithstanding the relation back, the trustee's title must be taken to begin at any rate against a purchaser for value from that time, and not from the act of bankruptcy. It seems to me that the short and conclusive answer to that contention is that it is directly opposed to the terms of the Bankruptcy Act, 1914, and to the authorities on the subject, e.g., *In re Pollitt* (2); and *In re Hirth* (3) to which further reference will be made later. The position is this: The bankrupt, by a transfer which has been held to be fraudulent and void and an act of bankruptcy, transferred

(1) L. R. 6 C. P. 584; 7 C. P. 547. (2) [1893] 1 Q. B. 455, 457.
(3) [1899] 1 Q. B. 612.

the furniture to A. Gunsbourg & Co., who took it with knowledge of the nature of the transaction, and are therefore not within the protection of s. 45 of the Bankruptcy Act, 1914. That company sold it to the Croydon Aviation Co., by whom it was sold again to the Anglo-Hellenic Co., who again sold some of it to the Dock, Wharf, &c. Union. These transfers, after the first, must be taken to be bona fide. A receiving order was made within three months of the original transfer and, by reason of it, the trustee's title related back to that transfer, but the order of the Court declaring it a fraudulent transfer under s. 1, sub-s. (1) (*b*), of the Bankruptcy Act, 1914, was not made till many months afterwards.

The trustee's title however accrues not by any order declaring the transaction an act of bankruptcy but by the operation of the statute as soon as the receiving order is made. If the trustee sued the person in possession of the bankrupt's property in trover or detinue he could succeed if he proved in that litigation that the transaction was an act of bankruptcy within the period of relation back, although no previous declaration had been obtained from the Court to that effect.

The question is, what is the effect of relation back on these transactions. In my opinion this is determined for me by authority: *In re Pollitt.* (1)

Lord Esher M.R. stated the effect of relation back as follows: "The title of the trustee in the subsequent bankruptcy related back to that act of bankruptcy. What does that mean? The result of the relation back is, that all subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed. The debtor must be considered as having become a bankrupt the moment the deed was executed. Then, he being a bankrupt, all the money which he then had, and all the money which was owing to him, passed to the trustee in the bankruptcy for the purpose of being distributed by him amongst the bankrupt's creditors."

(1) 1 Q. B. 455, 457.

C. A.
1920
GUNSBOURG, *In re.*
Lord Sterndale M.R.

If this be correct the position is exactly the same as if the bankrupt had been in possession of goods belonging to another person, to which he had no title, and had sold them to the original transferee who had then resold them. In such a case neither the original nor any of the subsequent transferees would take any title at all, and the true owner could recover the goods from anyone in whose possession he found them. I know of no doctrine of law or equity which would relieve any of the transferees in these circumstances.

It was however argued that this statement of Lord Esher cannot be taken to its full extent and that it must be confined to avoiding dealings with his property by the bankrupt himself after the date of relation back. This was founded on the argument that the original transfer was not void but only voidable, and that therefore any bona-fide purchase from the original transferee was protected. I am not sure that void and voidable are quite apt expressions, but clearly the transfer was not void at the moment it was made, for it might be that no circumstances would ever arise in which a trustee's title would accrue or the bankruptcy law apply. I will assume that voidable is a correct expression to describe the nature of the transaction, and then it becomes necessary to ascertain the effect of the avoidance caused by the making of the receiving order. This seems to me to be quite different from the effect of avoidance in the ordinary case of a voidable transfer where no principles of bankruptcy law apply. In this latter case the title of the person avoiding the transaction arises only from the time when he elects to avoid, and therefore intervening bona-fide transactions are protected because the transferor up to the date of avoidance had and could confer a good title. In the case under consideration so soon as the receiving order is made the trustee at once gets a title which relates back to the earliest act of bankruptcy within three months of the receiving order, whether it be the one upon which the receiving order is made or not, and therefore his position and rights are entirely different from those of an ordinary person who elects to avoid a voidable transaction.

I doubt if I should have any right to limit Lord Esher's words as suggested if they stood alone but, in my opinion, the exact point was decided by Lindley M.R. in *In re Hirth* (1), and it is therefore necessary to examine that case a little carefully. The Master of the Rolls says this (1): "Pausing there for a moment, it is impossible to say that because a deed, or a sale, or a conveyance is by that section made an act of bankruptcy it is then and there void and of no effect. That is obvious, because although a man may commit an act of bankruptcy he may never be adjudicated a bankrupt upon it; and of course if he is not, all this discussion as to acts of bankruptcy and as to void and voidable is beside the mark. You cannot say that because a man executes a deed which is declared to be an act of bankruptcy the deed is void as soon as he executes it, for the simple reason that you do not know whether circumstances will ever arise which will raise the question." Later on, having stated what the principle was, he says: We have, therefore, to consider what is the position of a trustee who finds that there has been a fraudulent conveyance, which is an act of bankruptcy, and who elects to impeach the transaction and demands back the property from the person in whose possession it is. What is the answer to that? It appears to me that there is absolutely no answer at all except this: that there are certain provisions in the Bankruptcy Act which relate to what are called protected transactions; and, of course, if a transaction is protected by those provisions, then the trustee cannot enforce that claim. However, we need not trouble ourselves about them. The facts exclude the application of those sections. There is nothing, so far as I have gone yet, which points to any difficulty at all in the way of the trustee who claims this property upon the ground that the conveyance, which is an act of bankruptcy, was void under s. 43 as from its date, when it was overreached by the petition and the adjudication." Again, the Master of the Rolls says: "It was argued that a winding up resolution stopped the right of the creditors of the company to sue, and that as their right of action

(1) [1899] 1 Q. B. 621, 622, 623.

C. A. 1920

GUNSBOURG, *In re.*

Lord Sterndale M.R.

had been stopped, ... they ought to be treated as being secured creditors, and as having in some way or other acquired over this property preferential claims which ought to override the title of the trustee in bankruptcy. That would be all very well if the title of the trustee in bankruptcy could be treated as accruing when he gave notice to impeach the transaction; it would be all very well as against everybody except the trustee in bankruptcy, whose title relates back. That doctrine is peculiar to bankruptcy; and it is because the trustee says, 'This property, the moment I elect to avoid and do avoid, is mine from an anterior date, under the special provisions of s. 43 of the Bankruptcy Act, 1883, that he overrides all the transactions and dealings which have been relied upon as an answer to his claim. That is the only point which has presented any difficulty; but I think I have shown that, having regard to ss. 4, 43 and 44 of the Bankruptcy Act, 1883, there is no real difficulty about it when the circumstances are understood."

It will be noticed that Lindley M.R. recognizes that the transfer by the bankrupt is not void at once because no receiving order may, as in *In re Carter and Kenderdine's Contract*, (1) ever be made, but nevertheless he states clearly that no security could be obtained upon the bankrupt's property by any transaction after the date to which the trustee's title relates back. It is true that in that case the creditors had not obtained anything which in any circumstances could be a security, but Lindley M.R. was giving his judgment in view of the argument of Mr. Herbert Reed Q.C. that relation back could not have the effect claimed for it, because it would prevent the acquisition of a security by means of bona fide transactions between the original transfer and the receiving order. In answer to that argument Lindley M.R. points out that relation back has that effect for the reasons previously given by Lord Esher. I ought to say that the corresponding sections of the Act of 1914 are to the same effect as those in the Act of 1883. I think therefore that I am bound by authority as well as by the provisions

(1) [1897] 1 Ch. 776.

of the Bankruptcy Act to hold that the effect of the relation back of the trustee's title is to put the transferees and sub-transferees in the same position as they would be if the bankrupt had transferred to them goods of another person to which he had no title either absolute or voidable. This was said, and said truly, to be a great hardship upon the innocent sub-transferee, but the hardship would be just as great in a case where he had bought goods to which his vendor had no title, and which might even be stolen, and yet he could not in that case obtain relief. The arguments for the appellant seem to me to ignore the fact that the doctrine of relation back puts the trustee in a position entirely different from that of an ordinary person who avoids a transfer, and from that of the trustee himself when he avoids a transfer which is not an available act of bankruptcy, and to which therefore his title does not relate back.

In re Hart, Ex parte Green (1) is a case of this last class. It has been spoken of as an extension of the equitable principle, but I do not quite understand why it is so described. It seems to me to follow the principles of the earlier cases. The bankrupt transferred some shares to his daughter who re-transferred them to a third person after a receiving order had been made against the bankrupt.

The sub-transferee who took them in good faith was held entitled to retain them against the trustee. This is entirely in accordance with the other cases because no question of relation back to the original transfer arose.

That transfer was outside the three months before the receiving order, and therefore gave a good title to a bona fide transferee which could not be affected by the subsequent avoidance of the transfer. When the receiving order was made therefore the shares were not the property of the bankrupt, but of his daughter, and did not pass to the trustee. She could give a good title to a bona fide purchaser and the receiving order made before that purchase had no effect on it, because the original transfer was beyond the date to which it could operate, and therefore the shares

(1) [1912] 3 K. B. 6.

C. A. 1920

GUNSBOURG, *In re.*

Lord Sterndale M.R.

did not form any part of the bankrupt's property, which passed to the trustee on the making of the receiving order. It remained an ordinary case of a voluntary settlement, and when the trustee avoided it his title accrued from the avoidance, and there was no relation back so far as that transfer was concerned.

It is no doubt an anomaly that bona fide transferees from the bankrupt are protected by the Bankruptcy Act, 1914, and not bona fide transferees from a transferee from the bankrupt, but, in the view which I take of the effect of relation back, I think a transferee in the position of the appellants is not protected in the absence of some protective statutory provision. I have examined the cases to which Wright J. referred in *In re Slobodinsky* (1) as possibly justifying the Court in giving protection on equitable grounds to persons in the position of the appellants. I think *Wilkes* v. *Bodington* (2) is the only one that can have any bearing on the matter and that, I think, does not support the suggestion.

It is treated by Horridge J. as a case in which there was a relation back of the trustee's title to the transfer impeached, but he distinguishes it on the ground that the transaction there was not an act of bankruptcy.

With respect I do not think this is the true view of the case. It is true that seven years before the transaction the transferor had committed an act of bankruptcy and that the doctrine of relation back was in existence. But that doctrine at that date did not carry the trustee's title further back than the date of the petitioning creditor's debt upon which the adjudication was founded, and therefore it did not relate back to the transaction in that case: see Williams on Bankruptcy, 11th ed., p. 203. This view I think is confirmed by the fact that no mention of the question of relation back is to be found in the judgment.

I do not think it necessary to consider whether if this transaction had been held fraudulent under the statute of 13 Eliz. c. 5, in which case it would also have been an act

(1) [1903] 2 K. B. 517. (2) 2 Vern. 599.

of bankruptcy, and not bad as a fraudulent conveyance, the appellants would have been protected, because it has in fact been held bad as a fraudulent conveyance. In my opinion the judgment of Horridge J. was right though he attached too much importance to the original transfer being an act of bankruptcy, while in my opinion the case depends not only upon that point, but upon the point whether it is within the period to which the trustee's title relates back, whether itself an act of bankruptcy or not. If it be within that period the property transferred must in my opinion be treated as property to which the bankrupt had and could confer no title upon anyone and therefore transferees from his transferee could not obtain any title.

I think the appeal fails and should be dismissed with costs.

WARRINGTON L.J. The question in this case is as to the title to certain furniture which by relation back of the bankruptcy vested in the trustee, but which was sold to a bona fide purchaser for value before the trustee actively asserted his title. [The Lord Justice stated the facts and continued:]

The appellants do not dispute that the assignment to A. Gunsbourg & Co., Ld., was a fraudulent assignment and an act of bankruptcy, but they contend that such assignment was not void, but voidable, and that transactions with purchasers for value without notice prior to the interposition of the trustee are protected. They contend further that the order for payment by Gunsbourg & Co. of the value of the furniture either had the effect of transferring the property in the furniture to the assignees or amounted to the declaration of an election on the part of the trustee to affirm the sale by Gunsbourg & Co. I will deal with these points in order.

The first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the presentation of the bankruptcy petition was the assignment to Gunsbourg & Co., and this therefore was the commencement of the bankruptcy (s. 37 of the

C. A. 1920

GUNSBOURG, *In re.*

Warrington L.J.

Bankruptcy Act, 1914), and the property purported to be thereby assigned was property of the bankrupt divisible amongst his creditors (s. 38) and vested in the trustee, whose title related back to the date of the assignment. In *In re Hirth* (1) Lindley M.R. made the following remarks which are exceedingly pertinent to the question we have to decide: "The section which lies at the foundation of this application, which is s. 4 of the Bankruptcy Act, 1883, says nothing about void and voidable, but says that certain transactions shall be acts of bankruptcy." [His Lordship then read the remainder of that passage, and the other passages quoted by Lord Sterndale from the same case, and continued:]

The assignees in that case were a company which had since been wound up. The M.R. having said that if the company were an ordinary person the title of the trustee would be perfectly plain, examines the contention that the winding up by substituting its creditors for the company placed them in a more favourable position, concluded as follows, "That would be all very well . . . . [His Lordship read to the end of the passage quoted above by Lord Sterndale and continued:]

In my opinion the result of this decision and of the Act of Parliament referred to above is that in the events which happened there was on September 20, 1917, a statutory transfer of the furniture and effects in question to the trustee, and that on his appointment they vested in him as from that date without the necessity of any assertion by him of his right thereto. It is not a case in which an assignment has been executed as to which (being voidable as against the trustee) he seeks the interposition of the Court to declare it void. All that the trustee in the present case need ask the Court to do is to hold that the assignment is fraudulent, the provisions of the Act as to the commencement of the bankruptcy and as to relation back then vests the property without any further order. The question then arises, does a purchaser for value without notice prior to the

(1) [1899] 1 Q. B. 612, 621.

active assertion by the trustee of his title acquire a right to the property which he can maintain against the trustee? It is of course abundantly clear that where a person bona fide acquiring title under an assignment by the bankrupt, which, though by the Act held void against the trustee, is in fact voidable only at the option of the trustee, and while it remains voidable, such a petitioner can maintain his title against the trustee. The commonest case is that of a voluntary "settlement" of property effected within two years prior to the bankruptcy, and a good example of the application of the rule is to be found in *In re Holden* (1), in which it was held that trustees under a voluntary settlement were entitled to a lien for their costs properly incurred prior to the avoidance of the settlement, on the ground that the settlement being originally valid they were entitled to such rights as their position as trustees thereunder would confer upon them. It is because the transaction is merely voidable that rights honestly acquired before it is avoided are protected.

In re Hart, Ex parte Green (2), which was relied upon before us, is a case of this nature. The commencement of the bankruptcy there was March 31, 1910. Prior to this date—namely, on October 14, 1909, the bankrupt had voluntarily transferred certain shares to his daughter who on April 13 sold them to a Miss Lomas, a bona fide purchaser for value. The adjudication took place on May 13 and the appointment of a trustee was subsequent to that date. The daughter and Miss Lomas were both duly registered as holders in the books of the company. The point was that though the transfer to Miss Lomas was prior to the avoidance of the transfer to her vendor, it was subsequent to the commencement of the bankruptcy, and it was contended that the title of the trustee therefore prevailed over the title of Miss Lomas. This contention was negatived by the Court, and I think the gist of the decision is to be found in a short paragraph in the judgment of the Master of the Rolls (3): "It

(1) (1887) 20 Q. B. D. 43. (2) [1912] 3 K. B. 6.
(3) [1912] 3 K. B. 10.

C. A. 1920

GUNSBOURG, *In re.*

Warrington L.J.

seems to me to follow that the trustee is in the same position as any other litigant who seeks a declaration that a deed is voidable, whether on the ground of fraud or undue influence or otherwise. It is settled law that however good a claim might be as against the grantee, the plaintiff cannot succeed if there has been any subsequent transaction for value and without notice."

The point decided in this case was that the relation back of the title of the trustee did not operate to vest in him property which prior to his appointment had been sold to a purchaser under a previous transfer which was prior to the commencement of the bankruptcy, and which was regarded as valid at the date of the sale. This is in effect so stated by Buckley L.J. when he says (1): "The question is whether the transfer made and perfected by registration after the act of bankruptcy but before the appointment of the trustee is by s. 47" (the present s. 42) "rendered void as between the trustee and the bona fide purchaser for value without notice." This seems to me to have no application to such a case as the present in which the effect of the subsequent bankruptcy is, without more, to vest the property in the trustee as from a date anterior to the dealing impeached.

It is not contended that there is any express provision in the statute which would protect a purchaser of property so circumstanced. Nor I think will the equitable doctrine under which a Court of equity declined to deprive a purchaser for value of a legal right acquired bona fide and without notice avail the purchaser in this case. The statutory transfer passes the legal property in the goods to the trustee as from the commencement of the bankruptcy, and subsequent sales thereof by any person other than the trustee can confer no property on the purchaser, unless indeed they be sales in market overt, or under conditions which by common law would render them good as against the true owner. It would in my opinion be a perversion of the equitable principle to take away the legal title and transfer it to one who by law has no title at all.

(1) [1912] 3 K. B. 12.

The consideration for the transfer included the issue to the bankrupt of certain shares in Gunsbourg & Co., Ld. They were never in fact issued, but if they had been that circumstance would in my view have made no difference. The restitution of the consideration when a voidable transaction is set aside is an application of the equitable principle that he who seeks equity must do equity. In this case the trustee is in my opinion seeking to recover from a purchaser what by law belongs to him, and is under no liability to repay to such purchaser, who has in fact acquired no title, the money paid by him.

Though a long time has elapsed since the original sales by A. Gunsbourg & Co. the claim of the trustee is not barred, and being a legal claim is not met by any equitable defence founded on laches.

In my judgment the title of the trustee ought to prevail over that of the appellants. I arrive at this conclusion with some regret, for I cannot but think that in some cases such an application of the provisions of the Act may cause hardship; but I think any such hardship should be removed by legislation and not by judicial decision.

As to the other point I have little to say. I think it is settled that a judgment for the recovery of goods or their value or for the value of the goods to be reduced if the goods are delivered, does not of itself transfer the property to the defendant, but only if and when it is satisfied by actual payment of the value: *Brinsmead* v. *Harrison*. (1)

The effect of the several orders against A. Gunsbourg & Co. is in my opinion the same as the ordinary alternative judgment for the delivery of the goods or their value ascertained by the jury. Here the value was separately ascertained and a separate order made for payment, but this in my opinion makes no difference in point of substance.

If I am right in this there is no case of election. The trustee has done nothing to affirm any of the sales by Gunsbourg & Co. or purchasers from them, except the sale by the appellants themselves, and this is recognized by the

(1) L. R. 6 C. P. 584; 7 C. P. 547.

C. A. 1920

GUNSBOURG, *In re.*

order appealed from. In my opinion the appeal fails and must be dismissed with costs.

YOUNGER L.J. On September 20, 1917, the bankrupt in this case agreed to sell to A. Gunsbourg & Co., Ld., a company he had caused to be incorporated on the previous day, all the assets of the business which he was then carrying on excepting cash and bills. The agreement was made between the bankrupt as vendor of the one part and the Company of the other part. The consideration for the sale was expressed to be 5000*l.* to be satisfied as to 1000*l.* in cash or fully paid shares of the Company, or partly in cash and partly in such shares at the option of the company, and as to 4000*l.* by the allotment to the vendor or his nominees of fully paid up preference shares in the company of that nominal amount. As appears from the judgment of the learned judge at a previous stage of the case (1) the consideration was never in fact satisfied by the company. The point however now important to be remembered, and I desire particularly to emphasize it, is that, presumably, the company was and remained liable so to satisfy it if the trustee in bankruptcy had thought it to the interest of the creditors in the bankruptcy that the company should be required so to do.

Amongst the assets included in the sale was a quantity of furniture in six rooms at Effingham House, Strand, where the bankrupt had his offices; and it is the title to a part of that furniture—the contents of four rooms—acquired in the interval and paid for by the appellants in good faith, as the learned judge has found, which is the subject of the present appeal. The receiving order against the bankrupt was made on October 24, 1917. It was founded on an act of bankruptcy committed on September 29, 1917—nine days after the sale to the company just mentioned.

Adjudication followed on December 12, 1917, and a trustee was appointed. On February 3, 1919, more than a year later, during which period the furniture in question passed through

(1) 88 L. J. (K. B.) 562.

at least two sets of hands, the trustee on a motion to which A. Gunsbourg & Co., Ld., was the only respondent obtained from Horridge J. a declaration that the agreement of sale of September 20, 1917, was fraudulent and void as against the trustee, and was an act of bankruptcy under s. 1, sub-s. (1.) (*b*), of the Bankruptcy Act, 1914, and the company by its proper officer was ordered within 28 days to account for all property transferred to it by the bankrupt under the agreement in question, and to hand over to the trustee all such property, or to pay to him the value of any part not handed over. The case is reported (1) and the facts with reference to the agreement for sale will be found in the judgment then delivered.

Two things in connection with that application may here be conveniently noted. The first is that the order then made was, of course, not binding on the present appellants. They were not served with the notice of motion, although their rights in the furniture, whatever they may be, had then accrued and were known to have accrued. The appellants do not however now question either the correctness or sufficiency of the order, and the effect of it in these circumstances as against them is to ante-date as from February 3, 1919, the commencement of the bankruptcy, to September 20, 1917, in place of September 29, 1917—its commencement up to that time.

The second thing is this. Although the trustee by his notice of motion in February, 1919, asked that the agreement of September 20, 1917, should be set aside, not only as an act of bankruptcy but also under the statute of 13 Eliz. c. 5, the learned judge did not see his way to accede to the second and more serious part of the application. His view apparently was that all the conditions necessary to justify such a finding were not clearly proved, the presence of valuable consideration moving from the company being apparently his main difficulty. That result however so far as the present appeal is concerned carries with it strange consequences. Had the learned judge found himself able

(1) 88 L. J. (K. B.) 562.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

to set aside the agreement under the statute of Elizabeth the execution of the agreement would still have remained an act of bankruptcy under s. 1, sub-s. (1) (*b*), of the Act of 1914, a sub-section which includes in its scope assurances void under the statute of Elizabeth as well as others more innocent in character. But in that case there would have been no doubt as to appellant's title to the furniture. It would on the present finding of Horridge J. under the terms of that statute itself have been completely protected: see May on Fraudulent Dispositions, 3rd. ed., p. 133, and cases there cited; and s. 5 of the statute. It follows that if the learned judge's decision now under appeal stands the title of the appellants, safe if the trustee's original motion of February, 1919, had entirely succeeded, is now displaced as a result of the trustee's comparative failure on that occasion. I draw attention to this matter because as I read the report in the *Law Journal* there was strong reason for holding the transaction of September 20, 1917, to be void under that statute of Elizabeth, and the present appellants might well have induced the learned judge to take that more serious view had they been there and seen that it was to their advantage to adopt that position. Indeed there was, so far as I can see, no reason to prevent them from taking it up even on the present application. But they did not do so either before the learned judge or before us, and having mentioned the point I pass it by.

Now, as I have indicated, part of the office furniture sold by the bankrupt to the company had been disposed of by it long before the launching of the trustee's motion of February, 1919. So far as it comprised the contents of four rooms, it had been sold first to a company called the Croydon Aviation and Engineering Co., Ld.; thereafter it was, with other furniture, sold by the liquidator of that company to a Mr. Maschonas, and was then re-sold to the appellants the Anglo-Hellenic Banking & Commercial Co., Ld. The learned judge has found as a fact that the Croydon company Mr. Maschonas and the Anglo-Hellenic Bank, the appellants, were all bona fide purchasers without notice of any invalidity

in the title of A. Gunsbourg & Co. That finding was challenged by Mr. Comyns Carr on behalf of the trustee on the ground that in another part of his judgment the learned judge with reference to the evidence of Mr. Maschonas as to the Croydon company's purchase stated that he did not consider him to be a reliable witness. And there does seem at least room for suspicion that Mr. Maschonas in September, 1917, or very shortly afterwards, may have known more of the bankrupt and his arrangements with his own company than he cared to admit. Indeed at a later period and after his bankruptcy the bankrupt actually entered the service of the Croydon company. But there is I think more than sufficient evidence on the learned judge's note to justify his conclusion of bona fides arrived at after seeing the witness, and in my judgment his finding of fact must in this Court, if without enthusiasm, be accepted as correct.

And that finding raises a serious and important question which must affect many other similar cases, namely whether a transfer for value from a seller of chattels, taken by the transferee in good faith, is to be subject to the danger of its being avoided by the ascertainment at a subsequent date indefinitely remote that, as between some trustee in bankruptcy and the purchaser's immediate, or secondary, or indefinitely further removes transferor, the title of that transferor was impeachable as a fraudulent assignment under s. 1, sub-s. (1.) (*b*), of the Bankruptcy Act, 1914.

If this be so, and the learned judge holds that it is, then it cannot, I think, be denied that the result would be as anomalous as it would be unjust. For there can be no doubt that had the original transaction here been declared fraudulent up to the hilt under the statute of Elizabeth the appellants, as I have already shown, would have been protected under that statute; had it been void as a fraudulent preference they would have been protected under s. 44 of the Act; had it been declared void as a voluntary settlement they would have been protected on equitable grounds: *In re Hart, Ex parte Green* (1); and even had they entered with

(1) [1912] 3 K. B. 6.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

good faith into it with the bankrupt himself they would have been protected under s. 45 of the statute, although the transaction would nevertheless have still remained an act of bankruptcy.

As Lord Esher M.R. said in the case in which this last point was decided—*Shears* v. *Goddard* (1): "The result of so construing the section is to do justice; whereas the result of the contrary construction would be gross injustice."

Nor does the suggestion that the bona fide purchaser is in any case in no worse a position than a purchaser, not in market overt, of stolen goods answer, as I think, the difficulty. After all a purchaser who mediately or immediately must trace his title through a thief is entitled to no indulgence as against the true owner who has been robbed. But in such a case as that with which we have here to deal, if we may regard the bankrupt as the counterpart of the thief, it is surely his creditors who have trusted him rather than the bona fide purchaser who need never have heard of him that should suffer by his default.

Indeed, if the order of the learned judge is to stand, so anomalous would be the predicament of bona fide purchasers in the position of the appellants that it has provoked the suggestion that theirs must be a casus omissus from the Act. And in my judgment this suggestion is none too strong—a casus omissus which might well seem to those concerned sufficient to call for statutory remedy, if such "gross injustice" as Lord Esher referred to is not in many cases to result.

But for my own part I find here no such casus omissus, because, but only because, the appellants' title is I think unimpeachable, the Act in this, as in all other directions sufficing, as I see it, to protect the bona fide purchaser, or, as Wright J. has put it in *In re Slobodinsky* (2): "the purchaser whose title is without stain."

Now the ground on which the learned judge has, somewhat reluctantly, as I read his judgment, arrived at the contrary conclusion and found against the appellants' title is, first,

(1) [1896] 1 Q. B. 406, 408. (2) [1903] 2 K. B. 532.

that in his view no protection can be extended to a bona fide purchaser for value in a case where the original transaction is itself impeached as an act of bankruptcy, and there is no protecting provision in the statute applicable. And his second and supplemental ground is that such a transaction, being an act of bankruptcy, is, in the learned judge's view, therefore "void," so that no subsequent purchaser for value can obtain any rights under it.

The first ground of that judgment was based, I think, entirely upon certain dicta—and they are no more—of Vaughan Williams J. in *In re Vansittart* (1) and *In re Brall* (2) where, referring to the protective clause in favour of purchasers in the section of the Act dealing with fraudulent preference—s. 44, sub-s. (2.), of the present statute—that learned judge observed that the necessity for the protective clause arose from the fact that fraudulent preference is an act of bankruptcy.

Now it is true that there is no similar protective clause with reference to a fraudulent assignment, also an act of bankruptcy, and Horridge J., observing that fact, and applying Vaughan Williams J.'s words to the case in hand, held, as I have said, that no protection to the appellants' title being expressly afforded by the statute, that title was not protected.

One is tempted at the very outset to be sceptical as to the soundness of reasoning which involves consequences so exceptional and so important as result from it, and when one remembers that included in these so-called fraudulent assignments are assignments which are described in the cases as fraudulent in law only, whatever that may mean, and assignments so highly meritorious as that in question in *In re David and Adlard.* (3) and also assignmetns which it may be to the direct interest of the trustee to enforce, one's scepticism is increased. It would indeed be strange that bona fide purchasers from assignees under them should, by the statute, invariably be hit, while bona fide purchasers from assignees under a fraudulent preference, by which

(1) [1893] 2 Q. B. 377, 380. (2) Ibid. 381, 385.
(3) [1914] 2 K. B. 694.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

the general estate must invariably lose, should always be protected.

And the history of the fraudulent preference section of the Act confirms one's initial doubts and makes very questionable the correctness of Vaughan Williams J.'s explanation of the protective sub-section. That history seems to show that whatever may have been the reason in the first instance for inserting the protective provision in the section, that reason is not to be found in the fact that fraudulent preference was an act of bankruptcy, and that on the simple ground that fraudulent preference per se was not then an act of bankruptcy at all. The fraudulent preference section, protective clause and all, first appeared, as will be recalled, in the Bankruptcy Act of 1869. Fraudulent preference did not become an act of bankruptcy until 1883. It became so for the first time in the Act of that year.

Indeed, if the conjecture may be hazarded, it would appear more probable that the protective clause has always been inserted in the fraudulent preference section for a very different reason: not at all because fraudulent preference was an act of bankruptcy, but in order to make it clear that the protection, always by bankruptcy law extended to bona fide purchasers, was not withheld even in relation to a transaction which was by the section itself "deemed to be fraudulent and void as against the trustee"—a transaction too which from its very nature it could never be to the interest of the trustee to affirm. The truth, I think, is that the significance of s. 44 in relation to the present question is not to be found in the fact that it contains a protective clause while none is to be found in the Act in relation to a fraudulent assignment, also an act of bankruptcy: its true significance is to be found in this, that a fraudulent preference although now an act of bankruptcy is, by that section, still expressly declared to be fraudulent and void as against the trustee—an unnecessary redundancy if the view now under discussion is correct—while a fraudulent assignment, always an act of bankruptcy, is nowhere so described. In other

words, and I now come to the second ground of the learned judge's judgment, no warrant is to be found in the Act, as I think, for his view that thereunder a fraudulent assignment is necessarily void, by which the learned judge means clearly absolutely void, because it is an act of bankruptcy. To read such a provision into the Act would have the effect of attributing, apparently quite gratuitously, to a fraudulent assignment for the purposes of the Act a characteristic which it does not in any other relation possess and one which in cases where valuable consideration passed it may be greatly to the disadvantage of the trustee that it should possess.

Now that such an assignment, particularly when it is one for value, is in other circumstances invariably voidable only and not void, will not be questioned, and, in my view, the authorities on this point, when properly understood, really all show that fraudulent assignments are, under the bankruptcy law also, voidable only, and must necessarily be so if the creditors are in all cases to have secured to them their proper rights. It is true that you do meet in the cases with expressions like that of Mellish L.J. in *Ex parte Villars* (1): "Whatever is by the statute made an act of bankruptcy is entirely void as against the trustee in bankruptcy." That is the strongest I can find and, pausing merely to observe that it was in the same case at a subsequent hearing disapproved by the full Court including the Lord Justice himself and is manifestly too general in its terms, I would point out that even such a statement as that means no more than this: that the act is void "at the election of the trustee"; that is to say it is voidable at his option. This, and with reference as it chances to a fraudulent assignment void as an act of bankruptcy, is I think made quite clear by the judgment of Lindley M.R. in *In re Hirth* (2), where he, pointing out that the statute says nothing about the deed being void or voidable, says of such an assignment as we have here that it is not then and there void and of none effect—it is not void on execution—it is only "void as against the trustee" (and these are the critical words) "who elects to impeach." I shall have to refer again

(1) (1874) L. R. 9 Ch. 432, 436. (2) [1899] 1 Q. B. 612.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

to this judgment for another purpose, but in my opinion on this point the Master of the Rolls is in no way at variance with Wright J. who, in the same case, said in so many words that such an assignment was a voidable contract only, and the same conclusion is reached if one approaches the question from another point of view.

Such an assignment may of course, as an act of bankruptcy, be the ground of a petition in bankruptcy, a receiving order thereon, and a subsequent adjudication. But the assignment does not thereby become of none effect. Its validity, although still an act of bankruptcy, may be affirmed as in *Shears* v. *Goddard*. (1) Indeed, the trustee may, as I think, always affirm it if in the interest of the creditors he deems it expedient so to do—not, it may be surmised, a rare occurrence when it is remembered that when he does elect to avoid the transaction he must hand back to the assignee all the consideration the bankrupt received under it. This obligation was denied in the argument. I can myself see no principle in support of the denial, and I do find in *In re Slobodinsky* (2) that Mr. Herbert Reed for the trustee, with the apparent approval of Wright J. as subsequently appeared said, as I think rightly: "If the trustee elects to avoid the debtor's contract of course he must return the shares and debentures the debtor received." If the trustee has this right of election it must be obvious that the deed is voidable only at his instance.

Further, if the trustee elect to avoid the deed, he must, if his right be disputed, move the Court, under B. R. 6, as in this case he did, for a declaration that it is void as against him with consequential relief. In short, the position of the trustee is, I think, merely this: such an assignment as that with which we have here to do being voidable as against creditors in the event of a timeously supervening bankruptcy, the trustee has "all the equity the creditors have and may impeach transactions which the bankrupt himself would be estopped from impeaching." See per Lord Loughborough L.C. in *Anderson* v. *Maltby*. (3)

(1) [1896] 1 Q. B. 406. (2) [1903] 2 K. B. 517.
(3) (1793) 2 Ves. Jun. 244, 254.

But he must elect to impeach and he must impeach, and if he does so his rights as against third parties are, I should think, undoubtedly the same as those of any other plaintiff entitled to impeach a voidable deed—neither more nor less. But it is said that, even if this is so, the doctrine of relation back (s. 37) alters the whole position, and the following observations of Lord Esher M.R. in *In re Pollitt* (1) are referred to. [His Lordship read the observations already quoted by Lord Sterndale and continued:] The force of these observations cannot be denied. But in making them Lord Esher M.R. has, I think, immediately in mind only the subsequent dealings by the debtor with his property. To these, except as protected by s. 45, every word of the judgment applies.

But if the words are to be extended further—if they are to extend to dealings by bona fide purchasers for value after the commencement of the bankruptcy with transferees holding under an impeached transaction property of the bankrupt—property which in their hands belongs to the trustee as from the commencement of the bankruptcy, then, in my judgment, these words cannot stand with the decision in this Court of *In re Hart* (2) and with the principles on which that decision was rested.

That case which has already been discussed was a case of a voluntary settlement void against the trustee in bankruptcy under s. 42, sub-s. (1.), of the Act. "Void from when?" asks A. L. Smith L.J. in *In re Carter and Kenderdine's Contract.* (3) "On one side it is said it is void ab initio—void from the date of the settlement. Where do you find that? The words are not there. There are other words which point in the contrary direction, and these are the words: 'void against the trustee in the bankruptcy.' What do they mean? They mean void as against the trustee in the bankruptcy from the date of the accruer of his title—or, in other words, from the date of the act of bankruptcy to which the title of the trustee relates back." It is I think

(1) [1893] 1 Q. B. 455. (2) [1912] 3 K. B. 6.
(3) [1897] 1 Ch. 776, 782.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

necessary to bear these words in mind if one would appreciate the close, and I think complete, analogy of *In re Hart* (1) with the present case. Its facts I need not again refer to. For present purposes it is enough to point out that, as explained in *In re Carter and Kenderdine's Contract* (2) the title of the trustee to the shares there in question related back to the act of bankruptcy which was prior to the transfer by Miss Hart to Miss Lomas, that accordingly, in the hands of Miss Hart at the commencement of the bankruptcy the shares were, by virtue of the doctrine of relation back, the shares of the trustee, and Miss Hart would have had no answer to a claim by him for their return. Moreover, although it is true under a different section of the Act—s. 47—the original transfer of the shares by the bankrupt to Miss Hart was also, as from the commencement of the bankruptcy, " void as against the trustee "—the very expression used here in the order of February 3, 1919, with reference to the assignment now in question, yet the Court of Appeal in that case held that the trustee had, as against Miss Lomas—a bona fide transferee —no right to recover the shares even although there was no protective section of the Act in her favour.

And the judgments of the Court show, as I think, that their reasoning was exactly applicable to the position of the appellants here.

" In my opinion," says Cozens-Hardy M.R. (3), " the true view is that a voluntary settlement is not void, but is only voidable by the trustee " (it will be remembered that the word in the statute is " void ") " who must apply to the Court for a declaration to that effect and consequential relief " (as happened, and necessarily happened, here). " It seems to me to follow," he proceeds, " that the trustee is in the same position as any other litigant who seeks a declaration that a deed is voidable, whether on the ground of fraud or undue influence or otherwise. It is settled law that however good a claim might be as against the grantee, the plaintiff cannot succeed if there has been any subsequent transaction

(1) [1912] 3 K. B. 6. (2) [1897] 1 Ch. 176, 782.
(3) [1912] 3 K. B. 10.

for value and without notice." Now, "subsequent" in that case, as in this, was subsequent to the commencement of the bankruptcy.

Buckley L.J. puts it thus (1): "For the decision of the present case it is sufficient to say that the bona fide purchaser for value without notice whose title was complete before there came into existence a trustee who could seek to avoid the voidable voluntary settlement has a good title."

That is the case here. In the present instance there was no such trustee until February 3, 1919, the date also upon which that trustee's election is of record.

But there are said to be two grounds upon which that case is distinguishable from the present.

The first is that the principle of *In re Hart* (2), which had reference to a voluntary settlement not an act of bankruptcy, cannot properly be extended to a fraudulent assignment which is not only an act of bankruptcy but which has become, as here, the effective commencement of the bankruptcy.

The sufficient answer to that view is, I think, to be found in the earlier part of this judgment. If, as I have endeavoured there to show, the fraudulent assignment here was not void but voidable only until the election by the trustee to avoid it in February, 1919, there can, I conceive, be no difference at the relevant date—the commencement of bankruptcy—between that assessment and any other voidable instrument as, for instance, a voluntary settlement voidable under s. 42 of the Act. An instrument voidable but innocent is neither better nor worse, so far as a bona fide purchaser is concerned, than an instrument voidable but fraudulent. I can myself see no difference between them. And this, be it noted, was the view also of Kennedy L.J. in *In re Hart.* (2) He there quoted with approval and applied to the case then in hand the observations of Wright J. in *In re Slobodinsky* (3), cited by the learned judge here. These observations were made in a case of fraudulent assignment and were, if I may respectfully say so, in my judgment sound. Kennedy L.J.

(1) [1912] 3 K. B. 14. (2) Ibid. 6.
(3) [1903] 2 K. B. 517.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

thought so too and applied them to a case of a voluntary settlement. He saw no distinction in principle between the two. Neither, if I may say so, do I.

And the other ground upon which it was said *In re Hart* (1) may be distinguished from the present case is that, there the transferee had acquired the legal interest in the shares in question—Miss Lomas had become the registered holder—and Cozens-Hardy M.R. and possibly Buckley L.J. refer to that fact—while here nothing equivalent to such registration has occurred : there has been no sale of this furniture in market overt.

But in my judgment *In re Hart* (1) proceeded on no such special circumstances. Such an observation as this of the Master of the Rolls would seem to show it (2) : " The property was of such a nature that no investigation of the title of the transferor was possible, and it would be almost shocking to deprive her of the property she acquired in good faith. I think I am entitled to do what was done by Lindley L.J. in *In re Carter and Kenderdine's Contract* (3)—namely, ' to consider what the consequences would be if the other conclusion were arrived at.' No purchaser of shares or stock on the Stock Exchange would be safe if Flora Lomas is to be deprived of her shares. If I may adopt the words of Lindley L.J. : ' to my mind good sense is shocked by such a startling conclusion as that.' "

But further, *In re Hart* (1) was really an extension of the principles already laid down by Vaughan Williams J. in *In re Brall* (4) and *In re Vansittart* (5) and in *In re Carter and Kenderdine's Contract* (3) by the Court of Appeal, and in *In re Vansittart* (5) the subject-matter of the settlement was, as here, chattels—to wit, jewellery, and there was no sale in market overt. Moreover, as I understand the equitable principle, where a plaintiff is seeking to set aside a voidable contract, the defence of purchaser for value without notice is complete without any reference to the legal estate. The

(1) [1912] 3 K. B. 6.
(2) Ibid. 10.
(3) [1897] 1 Ch. 776.
(4) [1893] 2 Q. B. 381, 385.
(5) [1893] Ibid. 377, 380.

defence is applicable to every kind of property movable and immovable, personal as well as real. And I can find no authority, nor was any produced, to show that in relation to chattels such a defence had to include an allegation of purchase of the chattels in market overt. In other words, such a defence in such a case was in a Court of equity so overwhelming when established that it could be maintained there without any assistance from the law.

In my judgment therefore the case of *In re Hart* (1) coupled with the application of principles already referred to is decisive of the present.

I must say one word about *In re Hirth* (2) already referred to. There are, in Lindley M.R.'s judgment in that case, some observations which are difficult to reconcile with the previous decision of the Court of Appeal in *Shears* v. *Goddard* (3), but the actual decision does not touch the present case. The only relevant finding there was that unsecured creditors of the company—the assignee under a bankrupt's fraudulent assignment—are not bona fide purchasers for value of the property comprised in it. In accordance with the principle here under discussion it is difficult to see how it was contended that they were. But the title of such purchasers properly so called was not in fact questioned in that case, for the liquidator had sold the property comprised in the assignment, or some of it, and the purchaser's titles were apparently not sought to be impeached. Indeed a careful perusal of the judgments shows, I think, clearly that the Master of the Rolls and the Lords Justices were dealing only with the position of the company—the original assignee.

The company, says Vaughan Williams J., could not claim the position of bona fide purchasers without notice. The property had not become the property of the company said Rigby L.J. The trustee was entitled to recover its proceeds from the company, the property itself not being in existence. The statement of the Master of the Rolls that the trustee who

(1) [1912] 3 K. B. 6. (2) [1899] 1 Q. B. 612.
(3) [1896] 1 Q. B. 406.

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

elects to impeach the deed can recover the property from the person in whose possession it is is certainly superficially more extensive, but it seems to me clear on his judgment that his observations were not directed further there than to the company itself and its liquidator.

I confess that it is with some satisfaction that I have arrived at the conclusion that the title of persons in the position of the present appellants with a title which I treat as one without stain can be protected by the application to the case of thoroughly well understood equitable principles. In analogous cases the Courts have protected the bona fide purchaser by a somewhat benevolent construction of possibly doubtful statutory phrases; here, as I think, the bona fide purchaser can only be defeated by reading into the statute by implication provisions which are not there. And this I conceive the Court will not do unless for some good reason it is so obliged, which can hardly be said to be the case where the result of doing so is, in A. L. Smith L.J.'s words in *Carter and Kenderdine's Contract*,(1) to "bring about something which is contrary to all the provisions of the bankruptcy law that bona fide purchasers for value should have their title impeached for what they have done in good faith."

I can now deal more briefly with the further contention put forward by the appellants in support of their appeal. I have already referred to the order of February 3, 1919. The Gunsbourg company made default in complying with that order, and on July 30, 1919, the Registrar made a report to the effect that the furniture comprised in the assignment had been valued by the debtor at 808*l.* 1*s.* 6*d.*

In pursuance of a supplemental order of the judge on July 31, 1919, the Registrar on August 22, 1919, made a further report particularizing the furniture in all the six rooms and reporting the value at the same figure of 808*l.* 1*s.* 6*d.*

On September 24, 1919, the trustee applied to the vacation judge for an order that the respondent company, having made default in complying with the order of February 3, 1919, "the said respondent company do pay to the trustee the sum

(1) [1897] 1 Ch. 776, 783.

of 808*l.* 1*s.* 6*d.* to the value (as found by Mr. Registrar Franke, in his report dated August 22, 1919) of the furniture, chattels and effects which, by the said order of February 3, 1919, were directed to be delivered over by the respondent company to the trustee. The respondent company did not appear. No one else was served with notice of the application, and upon it Greer J. ordered 'that the respondent company pay forthwith to the applicant the sum of 808*l.* 1*s.* 6*d.* the value (as found by Mr. Registrar Franke, etc.) of the furniture, chattels and effects which, by the said order of Horridge J., were directed to be paid by the respondent company to the applicants.' "

This order was followed on October 3, 1919, by the notice of motion served upon the present appellants upon which the order now under appeal was made.

On this it was contended by Mr. Tindale Davis that by the order of September 24, 1919, the trustee declared his election to proceed against the company for the value of the chattels only and took an order which, once and for all, deprived the company of the option, hitherto open to it, of satisfying the trustee's claim by returning the furniture.

If that be the effect of the order of September 24, 1919, it would appear to me that all claim to the furniture in specie in the hands of third parties must, ipso facto, be extinguished.

I have felt great difficulty on this point because I can think of no proper and sensible ground for the procedure of the trustee at this stage if such were not the effect of the order. He had a value placed upon the furniture as it was when new, and one can see a very good reason why, if he could obtain judgment at such a price, he should prefer it to the return of the furniture which had become old.

But my Lord and the Lord Justice do not attach that necessary meaning and effect to the order of September 24, 1919, and I am not sorry to acquiesce in their better judgment. The trustee did not by that order intend to abandon his claim against the appellants. He notified it to them in a letter addressed to Mr. Maschonas on July 31, 1919. Nor

C. A. 1920

GUNSBOURG, *In re.*

Younger L.J.

were the appellants in fact prejudiced by the order of September made in their absence whatever may have been the intention of the trustee in taking it. I would only add that to this point as presented to us the case of *Scarf* v. *Jardine* (1) relied upon below is no answer; but that, apart from the question of election, and assuming as I do that no execution has issued on the order of September 24, 1919, the case of *Brinsmead* v. *Harrison* (2) is conclusive.

If the decision rested with me my opinion would be that this appeal should be allowed on the ground first dealt with in this judgment.

Appeal dismissed.

Solicitors: *Westbury, Preston & Stavridi* for the appellants; *Carter & Bell* for the trustee.

G. A. S.

(1) 7 App. Cas. 345. (2) L. R. 6 C. P. 584.

REX *v.* BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

1920
Feb. 2, 3, 11, 27.

Small holdings and Allotments—Acquisition of Land—Compulsory Purchase—Local Inquiry—Order of County Council—Need for previous Consent of Board of Agriculture—Validity of Order—Certiorari—Owner of Land—Party aggrieved—Right to Writ—Small Holdings and Allotments Act, 1908 (8 *Edw.* 7, *c.* 36), *s.* 7 ; *s.* 39, *sub-ss.* 1, 3 ; *First Schedule, Part I.—Land Settlement (Facilities) Act,* 1919 (9 *& 10 Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 ; *s.* 10.

Sect. 10, sub-s. 1, of the Land Settlement (Facilities) Act, 1919, does not require that the previous consent of the Board of Agriculture and Fisheries should be obtained before a council make an order for the compulsory acquisition of land under s. 1, sub-s. 1, of the Act, but only that that consent be obtained before the council exercise the power conferred upon them by the order by proceeding actually to acquire the land by giving notice to treat or otherwise.

So held by Avory and Sankey JJ. ; A. T. Lawrence J. dissenting.

A county council, after holding an inquiry in regard to the matter at which all necessary parties were represented, made an order under the Small Holdings and Allotments Act, 1908, and the Land Settlement (Facilities) Act, 1919, for the compulsory acquisition of a farm for the purposes of these Acts. On an application by the owner of the farm for a writ of certiorari to remove the order into the High Court on the ground that the council had made it without jurisdiction, inasmuch as they had not obtained the previous consent of the Board of Agriculture :—

Held, that the order was not merely administrative but quasi-judicial in character, that it affected the applicant personally and not only as one of the public or of a section thereof, and that he had not in fact waived any right which he would otherwise have had to the relief which he claimed, and that if he made good the ground of his application, he was entitled to the writ ex debito justitiæ.

ORDER NISI for a certiorari.

The applicant, Mr. H. Sear, was the owner of a farm known as Old Ley Farm, Eaton Bray, in the county of Bedford.

In April, 1919, the Bedfordshire County Council, being desirous of acquiring land for the settlement of ex-service men, asked the applicant whether he would sell the farm to the County Council, and he expressed his willingness to do so on certain terms.

In June, 1919, the County Council made further inquiries

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

about the farm, when the applicant replied, withdrawing his offer and stating that he had decided to work the farm himself.

On August 19, 1919, the Land Settlement (Facilities) Act (1) was passed.

On August 28, 1919, the Board of Agriculture and Fisheries sent to all councils and among others to the Bedfordshire County Council a circular letter explaining the effect of the Act as understood by the Board. (1)

On October 1, 1919, the County Council wrote to the applicant informing him that their Small Holdings and Allotments Committee had appointed a special sub-committee to hold an inquiry at Eaton Bray with a view to the compulsory acquisition of his farm for the settlement of ex-service men under the Small Holdings and Allotments Act, 1908 (1), and the Land Settlement (Facilities) Act, 1919 (1), and that the sub-committee would hold an inquiry at the Eaton Bray school on October 7, at 12 o'clock, when they would be prepared to hear all parties interested in the farm.

On October 7, 1919, the inquiry was held accordingly, the parties or their representatives being present and also a Commissioner of the Board of Agriculture and Fisheries.

On October 9, 1919, the County Council, without having obtained the consent of the Board of Agriculture to their doing so, made an order under the above-mentioned Acts and the Small Holdings and Allotments (Compulsory Purchase) Regulations, 1919 (1), and in accordance with the form of order set forth in the appendix to these regulations, stating, inter alia, that the County Council were thereby empowered, for the purposes of providing small holdings, to put in force as respected the several lands and easements described in the schedule thereto (being the lands and easements constituting the said farm) the provisions of the Lands Clauses (Consolidation) Acts (2) with respect to the purchase and taking of land otherwise than by agreement, but subject

(1) See note at end of this report.

(2) Lands Clauses Consolidation Acts, 1845, 1860, 1869 (8 & 9 Vict. c. 18; 23 & 24 Vict. c. 106; 32 & 33 Vict. c. 18). See also 46 & 47 Vict. c. 15, and 58 & 59 Vict. c. 11.

to the terms of the above Acts of 1908 and 1919, the above regulations and the order; and that the order should take effect as if it incorporated, subject to the necessary adaptations, the Lands Clauses Acts, (1) and ss. 77 to 85 of the Railway Clauses Consolidation Act, 1845, but subject to the modification that any question of disputed compensation should be determined under and in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), and the previously mentioned Acts of 1908 and 1919.

From the schedule to the order it appeared that the property proposed to be purchased comprised a house, garden, buildings and yards, orchard, and arable and pasture land of a total acreage of upwards of 139 acres, and that the appellant was both the reputed owner and the reputed occupier of all the property.

On November 4, 1919, the County Council wrote to the applicant informing him of the making of the order and enclosing a copy of it.

On the same date, the County Council wrote to the Board of Agriculture informing them of the making of the order and enclosing a copy of it, informing them of the holding of the preliminary inquiry, and asking that the approval of the Board might be given to the service by the County Council upon the applicant of a notice to treat, and of a notice requiring possession of the farm under s. 2, sub-s. 1, of the Act of 1919, within fourteen days.

On November 20, 1919, the Board of Agriculture wrote to the County Council authorizing them to serve both these notices upon the applicant.

The County Council served upon the applicant a notice to treat dated December 1, 1919, and a notice dated December 10, 1919, that they proposed to take possession of the farm in fourteen days. They did not, however, act upon the latter notice.

By his particulars of claim dated December 9, 1919, the applicant stated that he was freeholder and occupier of all

(1) See note ante, p. 466.

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

the farm and claimed in respect of its compulsory purchase 5734*l.* 14*s.* 9*d.*

On January 16, 1920, the applicant obtained an order nisi calling upon the County Council to show cause why a writ of certiorari should not issue to remove into the High Court the order of October 9, 1919, with a view to its being quashed, on the ground that it did not appear that the consent of the Board of Agriculture had been obtained before the making of the order.

The proceedings of the County Council were in accordance with the above-mentioned circular letter.

Konstam K.C. and *Grierson* for the Bedfordshire County Council. Even assuming that the order in question was improperly made, it ought not to be removed into this Court by writ of certiorari. The order is of an administrative and not of a judicial character, and it does not affect the applicant personally but only as a member of the class of landowners, and therefore the applicant has no right to the writ. Moreover he has waived by his conduct any right to it that he might otherwise have had. The writ in the circumstances is only discretionary, and the Court should not exercise its discretion in favour of the applicant: *Rex* v. *Williams, Ex parte Phillips.* (1)

The order in question was properly made and is valid. It is an order for the compulsory acquisition of land which was made by the County Council under the Small Holdings and Allotments Act, 1908, within the meaning of s. 1, sub-s. 1, of the Land Settlement (Facilities) Act, 1919. (2) It is not a condition precedent to the making of an order of that kind by a county council that the previous consent of the Board of Agriculture and Fisheries should be obtained under s. 10, sub-s. 1 (2), of the latter Act. This clearly appears from these sub-sections and the other relevant provisions of the Acts, if they be rightly construed. Sect. 10, sub-s. 1, of the Act of 1919 (2), does not provide that the power to acquire land

(1) [1914] 1 K. B. 608.

(2) See note at end of this report.

compulsorily, under the Lands Clauses Acts (1), shall not be vested in a council without the previous consent of the Board of Agriculture, but only that power shall not be exercised except with the previous consent of the Board. By the order in question, which was made under s. 1, sub-s. 1, of the Act of 1919 (1), that power was vested in the County Council, but was not exercised within the meaning of s. 10, sub-s. 1. (1) If s. 10, sub-s. 1, had required the previous consent of the Board to the making of the order, it would have come before and not after s. 1. As s. 26 makes the Board responsible for loss properly incurred by the Council until 1926, it is only reasonable to suppose that by s. 10, sub-s. 1, it required the previous consent of the Board to every order for the purchase of land.

The purpose of the Act of 1919 as shown by its title and by several of its provisions, such as ss. 1, 3 and 9, is to facilitate land settlement, and it would be inconsistent with that purpose to require, as a condition precedent to the making of an order of this kind, the previous consent of the Board of Agriculture, which had not been required by the Act of 1908. It cannot be supposed that the Act of 1919 which in the case of an order such as this dispenses by s. 1, sub-s. 1, with the need for subsequent confirmation by the Board of Agriculture for three years, should intend by s. 10, sub-s. 1, to impose the still more onerous requirement of the previous consent of that Board.

According to the view of the appellant, the previous consent of the Board of Agriculture under s. 10, sub-s. 1, would be required in every case in which a council proposed to acquire land, not only compulsorily but even by agreement. In s. 1, sub-s. 1, the words " duly made " merely mean that the order must be duly made by the Council under the Act of 1908, and do not imply that the previous consent of the Board of Agriculture, under s. 10, sub-s. 1, must be obtained before it can be made. In that sub-section the words " except as otherwise expressly provided by this Act " refer to such sections of the Act as s. 13, which recognizes the need for the consent of the Board of Agriculture to an order for the

(1) See note ante, p. 466.

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

acquisition of land where that consent is required by some Act other than the principal Act, and s. 16, sub-s. 2, which provides that in certain cases of exceptional hardship an order for the acquisition of the land shall not be valid unless confirmed by the Board. If s. 10, sub-s. 1, requires the previous consent of the Board to every order for the acquisition of land it is not easy to understand why these last-mentioned provisions should have been included in the Act. Further, if the applicant is right, it follows that during the period from 1922 to 1926 it will be necessary to obtain both the previous consent and the subsequent confirmation of the Board to every order for compulsory purchase, a course which would not facilitate land settlement.

An order made under s. 39, sub-s. 1, of the Act of 1908, on being confirmed by the Board of Agriculture, becomes part of the Act, and its validity can no longer be questioned : *Ex parte Ringer* (1) ; and an order duly made under s. 1, sub-s. 1, of the Act of 1919 without confirmation has the same effect as if it had been so confirmed. An order made in pursuance of an Act for the purpose of carrying out its provisions is of statutory force : *Elve* v. *Boyton* (2) ; *Wakefield Light Rys. Co.* v. *Wakefield Corporation.* (3) The provisions of the Lands Clauses Acts apply to every such undertaking for the purchase of land as that of the County Council under the Acts of 1908 and 1919 ; *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (4), and the County Council are therefore entitled to put these provisions in force for the purchase of the land in question.

Foà in support of the rule. If, as the applicant contends, the order of the County Council was made without jurisdiction and is invalid, a writ of certiorari ought to issue to remove it into this Court. The order is of a judicial and not of an administrative character, and the applicant is specially aggrieved by it and more than other members of the public or even than other members of his own class of landowners, and he is therefore entitled to the writ ex debito justitiæ :

(1) (1909) 73 J. P. 436.
(2) [1891] 1 Ch. 501.
(3) [1907] 2 K. B. 256.
(4) [1919] A. C. 744.

Reg. v. *Surrey Justices* (1) and *Rex* v. *Williams, Ex parte Phillips.* (2) In any case the Court in its discretion should allow the writ to go.

The order in question was made by the County Council without jurisdiction and is invalid, inasmuch as it was made without the previous consent of the Board of Agriculture under s. 10, sub-s. 1, of the Act of 1919. This appears from a consideration of the material sections of the Acts.

The Act of 1908, s. 39, sub-s. 1, provides that where a council propose to purchase land compulsorily under that Act they may submit to the Board of Agriculture an order putting in force the provisions of the Lands Clauses Acts; and sub-s. 3 provides that an order under that section shall be of no force unless confirmed by the Board, and that an order when so confirmed shall become final and have effect as if enacted in that Act, and that the confirmation by the Board shall be conclusive evidence that the requirements of the Act have been complied with and that the order has been duly made and is within the powers of the Act. These provisions show that the order of the County Council must be an existing and valid order before it is confirmed by the Board of Agriculture. That also appears from s. 16 of the Act of 1919 which provides that an order may authorize the acquisition of the particular kinds of land there dealt with, but that it shall not be valid unless confirmed or made by the Board, thus implying that in ordinary cases an order if duly made is valid even without confirmation; and from s. 28, sub-s. 1, of the Act of 1919, which provides that the kinds of land there mentioned shall not be acquired by a council except under an order for compulsory purchase made under the principal Act which shall be provisional only and shall not have effect unless confirmed by Parliament, and thus implies that but for that express provision the order would have had effect without any confirmation as an order for the compulsory purchase of the land. Sect. 39, sub-ss. 1 and 3, of the Act of 1908 also show that the confirmation by the Board of Agriculture is not essential to the existence and validity of the order, but is merely

(1) (1870) L. R. 5 Q. B 466, 472. (2) [1914] 1 K. B. 608, 613.

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

conclusive evidence that the order has been duly made and is within the powers of the Act. The order of the council if duly made under the Acts, even though it be not confirmed by the Board of Agriculture, is that which authorizes the compulsory purchase of the land. The making of the order is not something anterior to and different from the exercise of the powers of compulsory purchase given to the Council by the Act, but is the first step in the actual exercise of these powers. This appears from the sections already referred to. It also appears from the marginal note to s. 1 of the Act of 1919, which describes that section as providing for the suspension of requirements as to confirmation of "orders for the acquisition of land."

[AVORY J. The general rule would appear to be, in the case at least of public general Acts, that marginal notes do not form part of the Act and cannot be referred to for the purpose of construing its provisions: per Phillimore L.J. in *In re Woking Urban Council* (*Basingstoke Canal*) *Act*, 1911. (1)]

The Small Holdings and Allotments (Compulsory Purchase) Regulations, 1919, cl. 8, defines the expression "compulsory order" as meaning an order which "authorises land to be compulsorily purchased"; and clause 1 states that a compulsory order for purchase made by a council shall be in the form set forth in the appendix to the regulations, in which form of order it is stated that the council are thereby empowered to put in force as respects the land the provisions of the Lands Clauses Acts.

The Act of 1919, so far as it amends the principal Act of 1908, is to be construed as one with that Act, and the "order" referred to in its amending provisions must therefore be the same as that referred to in the principal Act. The Act of 1919 provides by s. 1, sub-s. 1, that an order for the compulsory purchase of land, which is duly made within the next three years under the Act of 1908, need not, except as otherwise provided, be confirmed by the Board of Agriculture. That sub-section thus excepts an order duly made under the Act

(1) [1914] 1 Ch. 300, 321, 322.

of 1908 from the need for confirmation by the Board of Agriculture. The words "duly made" under the Act of 1908 must there mean duly made under that Act as amended by the Act of 1919. The latter Act by s. 10, sub-s. 1, provides that the power of a council to acquire land for small holdings under the principal Act shall not be exercised before 1926 except with the previous consent of the Board of Agriculture. In that sub-section the provision that the power of a council to acquire land shall not be exercised, must include the power of the council to make an order for the acquisition of land, because as has already been seen the making of the order is an exercise of the power to acquire land. That being so, the order is not "duly made" under s. 1, sub-s. 1, unless it is made with the previous consent of the Board under s. 10, sub-s. 1. Thus, while the Act of 1919 does away for a time with the need for subsequent confirmation by the Board of Agriculture, which was no essential to the making of the order, it requires the previous consent of the Board as a necessary condition of the making and validity of the order. The proviso to s. 1, sub-s. 1, of the Act of 1919, which says that a grant or inclosure of common purporting to be made by any such order shall not be valid unless made with the consent of the Board under the Commons Act, 1899 (62 & 63 Vict. c. 30), which might at first sight appear to imply that orders made for other purposes are valid without the consent of the Board, is incapable of being so construed inasmuch as it does not mean that the order is invalid without that consent, but that the grant or inclosure of common is invalid without it.

It may be said that s. 10, sub-s. 3, provides that the section shall be deemed to have had effect as from January 1, 1919, though the Act was not passed until August, 1919, and thus apparently required the previous consent of the Board to orders made before the Act had come into force and before the councils making the orders could know of the requirement, but that provision merely shows that the Act has been carelessly drafted, and cannot be taken to imply that the previous consent of the Board is unnecessary to orders made after the

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

passing of the Act. Even under the Act of 1908 the previous consent of the Board is in some cases necessary to the acts of the County Council, as, for example, under s. 9 to the letting of land.

The County Council "exercised" their power to acquire land within the meaning of s. 10, sub-s. 1, of the Act of 1919, by giving notice to treat: see *Davis* v. *Witney Urban Council* (1), and as they did so without the previous consent required their proceedings were invalid.

It is true that one of the objects of the Act of 1919, as appears from its title, is to facilitate land settlement, but the construction of the Act adopted by the appellant, which substitutes for subsequent confirmation by the Board of Agriculture the previous consent of the Board to the making of the order, is not inconsistent with that object. The subsequent confirmation of the order by the Board which is provided for by s. 39 of the Act of 1908 involves a detailed and laborious investigation of the circumstances which may result in the modification of the order, as appears from sub-s. 3 of that section, and also from the Small Holdings and Allotments (Compulsory Purchase) Regulations, 1919, regs. 1 and 3; whereas the giving of previous consent by the Board is a comparatively easy matter, as appears for example from its being required by s. 9, sub-s. 2 (*b*), of the Act of 1908, to the simple proceeding of letting one or more small holdings to an association for the purpose of creating small holdings.

Konstam K.C. replied.

Feb. 27. The following judgments were read:—

A. T. LAWRENCE J. This is a rule calling on the County Council of Bedfordshire to show cause why an order made by them on October 9, 1919, should not be quashed on certiorari.

The ground upon which the rule was obtained is that this order was made without the previous consent of the Board of Agriculture and Fisheries. The County Council contend that no such consent is necessary under the Land Settlement

(1) (1899) 63 J. P. 279.

(Facilities) Act, 1919. This Act was passed, as indicated by its title, to amend the Small Holdings and Allotments Act, 1908, and otherwise to facilitate land settlement. It is contended that it will facilitate land settlement to read s. 10, which requires the "previous consent" of the Board as applying only to the acquiring of the actual title to the land. It is admitted that the consent of the Board must be obtained, but it is said it need not be obtained before making the order in question.

The short question, therefore, is, whether this order is an "exercise" by the council of the power to acquire land for small holdings under the principal Act. It is in the form prescribed for the "acquisition of land" pursuant to s. 39 and the First Schedule, Part I., of the Act of 1908. A county council is itself a creation of statute. It has no powers of any sort save such as are conferred by statute. It cannot affect common law rights of property unless power to do so is given it by the express words of an Act of Parliament or by necessary implication from those words. In this case we are concerned with its power to acquire compulsorily land for small holdings. There are two Acts dealing with the subject: the Act of 1908 and the amending Act of 1919. The financial policy of these Acts is different. The earlier Act did not provide any absolute indemnity of the county against losses incurred by it in working the Act; the later Act by Part III. provides that all losses reasonably incurred should be recouped by the Board, that is out of the national exchequer. This seems to me to explain the introduction by s. 10 of the requirement of the "previous consent" of the Board. Without this previous consent there could be no control by the Board of either the number of holdings in, or the amount of debt incurred by each county. The Lands Clauses Consolidation Acts are always [see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 1] incorporated in private Acts which authorize the taking of land for public purposes, and it is this incorporating enactment which gives Parliamentary sanction and validity to the notices to treat subsequently given thereunder. In the Act of 1908 it was

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

thought necessary to incorporate by s. 38 the Lands Clauses Consolidation Acts for the purpose even of purchasing land by agreement. Now, it is suggested that a county council can apply the compulsory powers of those Acts to lands by its own mere motion. It is said that this order merely clothes the council with the powers of the Lands Clauses Acts in respect of the closes of land mentioned therein and does not affect the land itself. The answer to this is twofold. First, that the statute nowhere confers power upon a county council to apply the compulsory clauses of the Lands Clauses Acts of its own motion. The application of the Lands Clauses Acts is machinery for "the acquiring of land." It is a first step in the acquiring of the land, and nothing but the authority of an Act of Parliament can apply those Acts to land which is previously subject to the common law. It is not true to say that this order does not affect the land, the particular closes are set out in the order, and if the order had been "duly made"—that is, made with the "previous consent" of the Board—it would, under s. 1 of the Act of 1919 and s. 39, sub-s. 3, of the Act of 1908, have had effect "as if enacted in" the statute. An owner with notice of a valid order specifying the parcels as this order does could not deal with his land as heretofore. It would be bound in its then state by the order: *Metropolitan Ry. Co.* v. *Woodhouse.* (1)

As a matter of construction the only thing that can be said for the order as made is that s. 10 which requires a previous consent of the Board is out of its proper place; it should come before s. 1 and not after it. The words of s. 1 do not, however, support the arguments of Mr. Konstam for the respondents, for the title of Part I. is "Provisions as to the Acquisition of Land," and sub-s. 1 speaks of "any order for the compulsory acquisition of land" and not of "any order for the application of compulsory powers." It expressly says, "which is duly made," a phrase which has no meaning if it does not refer to the previous consent of the Board. Sub-s. 2 provides for notice of the order to each owner lessee and occupier

(1) (1865) 34 L. J. (Ch.) 297

of the land "authorized to be acquired." Authorized by whom if not by the consent mentioned in s. 10? Sect. 2, sub-s. 1, speaks of the council "entitled to purchase the lands under the order." These words seem to point to an "authorization" and an "entitling" due to the observance of the requirement of s. 10—namely, the previous consent of the Board. The word "order" is not applicable to a direction given without authority, it imports authority in the person making it. Sect. 39, sub-s. 1, of the Act of 1908 used the word "order" it is true, but it was to be "submitted," and it immediately provided by sub-s. 3 that the thing should be of "no force" unless and until confirmed.

It seems to me that there is no ground for saying that this statute authorizes an order for the acquisition of compulsory powers as distinguished from an order for the acquiring of land. The making of this order was an "exercise" of "the power" of acquiring the lands within the meaning of s. 10, but it was unauthorized and therefore bad. Further, it seems to me that the change in the policy from that in the Act of 1908, when any losses incurred in the matter of small holdings fell previously upon the county council, and that of the Act of 1919, under which any losses fall upon the nation, requires the enactment of s. 10 whereby the previous consent of persons responsible to Parliament is required. This is a fundamental constitutional principle. A county council has no responsibility to Parliament and should not be construed as having any authority to incur expenses and costs for the nation of its own mere motion. Sect. 10 appears to me to make this previous consent necessary as well to purchases by agreement, as to purchases under compulsory powers and for the same reason—namely, the financial responsibility arising from the exercise of such powers. No argument was adduced that I was able to apprehend for suggesting that it facilitated the creation of small holdings that the consent of the Board should be capable of being obtained after, rather than before, it made the order. Indeed I think that the contrary would in practice be found to be the case, and upon the facts before us it would appear that the council might have obtained the

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

consent of the Board upon the report of a Commissioner who attended the local inquiry on October 7 if it had not been misled as to what is in my opinion the true construction of the Act. This makes me regret the judgment I feel bound to give.

I think the rule should be made absolute and the order quashed.

AVORY J. (1) The rule in this case calls upon the Bedfordshire County Council to show cause why an order made by them under the provisions of the Small Holdings and Allotments Acts, 1908 to 1919, in respect of Old Ley Farm in the said county, should not be removed into this Court by writ of certiorari with a view to its being quashed on the ground that the consent of the Board of Agriculture had not been obtained before the making of such order.

A preliminary objection has been taken by Mr. Konstam in showing cause that the order in question being of an administrative character is not subject to the jurisdiction of this Court by certiorari; that the applicant is not a party aggrieved and the issue of the writ therefore discretionary, and that the applicant by his conduct had waived any right to this remedy. In my opinion this objection fails. The order is one affecting the applicant's property and his rights therein, it was made after the holding of a local inquiry at which the parties were represented, and at which a representative of the Board of Agriculture was also present, it was in my opinion at least quasi-judicial—the applicant is personally aggrieved and not merely as a member of the public, there is no evidence of the alleged waiver, and the applicant is therefore entitled to the writ ex debito justitiæ, if he succeeds on the merits: see *Reg.* v. *Surrey Justices.* (2)

The question therefore to be determined is whether the consent of the Board of Agriculture is a condition precedent to the making of a valid order by the County Council for

(1) In the absence of Avory J. his judgment was read by Sankey J.
(2) L. R. 5 Q. B. 466.

the compulsory acquisition of land under s. 1, sub-s. 1, of the Land Settlement (Facilities) Act, 1919. [His Lordship stated the facts and continued:]

The contention on behalf of the applicant is that s. 10, sub-s. 1, of the Land Settlement (Facilities) Act, 1919, requires the consent of the Board of Agriculture to be given prior to the making of any such order as that of October 9 for the compulsory purchase of land, that such previous consent is a condition precedent to the validity of any such order, and that by the making of the order in this case and the giving of the notice thereof to the applicant "the power of a Council to acquire land" was "exercised" within the meaning of that sub-section. The contention on behalf of the County Council is that under the Small Holdings and Allotments Act, 1908, such an order for the compulsory acquisition of land could be made without any previous consent of the Board of Agriculture, that s. 1, sub-s. 1, of the Act of 1919 dispenses with the necessity of confirmation by the Board of Agriculture which was required by s. 39 of the Act of 1908, and that s. 10, sub-s. 1, of the Act of 1919 only suspends the operation or putting into force of the said order until the consent of the Board has been obtained.

The words of s. 10 of the Act of 1919 construed literally are undoubtedly capable of the construction contended for by the applicant, and prima facie it may be said this is the meaning to be attributed to them. The marginal note to this section should, I think, be disregarded: *Attorney-General* v. *Great Eastern Ry. Co.* (1) I think, however, that it is necessary to look at the history of the legislation on this subject and the manifest object of this amending Act of 1919 in order to ascertain the true meaning of s. 10. Under the Act of 1908, s. 7, a county council was empowered to acquire land for small holdings by agreement or compulsorily, and under s. 39 of the same Act an order for compulsory purchase of land had no force unless it was confirmed by the Board of Agriculture; and by the provisions of that Act the County Council was responsible for any loss

(1) (1879) 11 Ch. D. 449, 460.

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

AVORY J.

incurred by the exercise of their powers: see s. 7; and their financial outlay for the purpose was restricted: see s. 17. The object of the Act of 1919 as shown by the title is to make further provision for the acquisition of land for small holdings, to amend the existing enactments and otherwise to facilitate land settlement. With this view the requirements for confirmation by the Board of Agriculture of an order for compulsory purchase is abolished by s. 1. By s. 11, sub-s. 7, the council is, for two years after the passing of the Act when selling or letting land for small holdings, to give preference to men who have served in the forces of the Crown, and to women who have been engaged in certain work during the war, and by s. 26 the Board of Agriculture is made responsible for any loss reasonably incurred by the council in the exercise of the powers in question until the year 1926. Looking at the whole of this Act of 1919, particularly ss. 1 and 3, I think one of its main objects is to expedite the acquisition of land for small holdings for three years after the passing of the Act, for the benefit of ex-service men and women. If there is any reasonable construction of the provisions of s. 10 which will carry out, or is consistent with this object, I think it should be adopted. If the applicant is right in saying that an order for the compulsory acquisition of land such as that now in question is not duly made under s. 1 except with the previous consent of the Board of Agriculture, the same delay will occur as if it required confirmation, for it cannot be supposed that the Board will give a consent without inquiring into the merits. I think the words "duly made" in s. 1 mean made in conformity with the provisions of the Small Holdings and Allotments Act, 1908, before confirmation by the Board. It is to have effect as if it had been confirmed, and having regard to the concluding words of s. 39, sub-s. 3, of the Act of 1908, that means that it is to be deemed to have been duly made. Turning now to s. 10 of the Act of 1919, if the applicant is right in saying that the previous consent of the Board is necessary in all cases before the County Council proceed to exercise their powers under the Act of 1908 this will apply

equally to the acquisition by agreement or by compulsory purchase, thereby imposing a fetter on their power to acquire by agreement which is nowhere to be found in the Act of 1908. In the case of compulsory purchase after 1922 and until 1926, if the applicant is right, a previous consent and a subsequent confirmation will both be necessary to the validity of an order such as that now in question, and in the case excepted from s. 1, sub-s. 1, of the Act of 1919, which is provided for in s. 16 of that Act, the same previous consent and subsequent confirmation will both be necessary. If this be the correct construction of s. 10 it must inevitably cause serious delay and certainly will not "facilitate land settlement," and if s. 10 were intended to be a clog on the exercise of the powers under s. 1, sub-s. 1, it would I think have been done by saying in s. 1: "Any order which is made with the consent of the Board, etc." The proviso to s. 1, sub-s. 1, appears to me to create an exception to the general provisions and to be out of place if the applicant's contention is to be adopted. It should have appeared as a proviso to s. 10. Sub-s. 3 of s. 10 is unintelligible to me on any construction of sub-s. 1, as it would nullify anything that had been validly done under the Act of 1908 between January 1, 1919, and August 19, 1919, and Mr. Foà in his lucid argument was unable to enlighten us as to its meaning.

Having regard to these considerations I have come to the conclusion that s. 10, sub-s. 1, does not require that the previous consent of the Board of Agriculture shall be given before an order such as that now in question is made by the County Council under s. 1, but that it means as Mr. Konstam has contended that such an order having been made, the consent of the Board must be given before the council proceed to acquire the land by giving the notice to treat under the Lands Clauses Act; in other words, the council may proceed under s. 1, sub-s. 1, to clothe or invest themselves with the powers conferred by the Lands Clauses Acts in regard to some particular land, but must obtain the consent of the Board before proceeding actually to acquire the land by giving the notice to treat, as was done in the present case; and

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

the Board being now and until the year 1926 in the position of paymaster will presumably only need to inquire as to the proposed expenditure.

For these reasons, after some doubt due to the respect which I entertain for the contrary opinion expressed by my Lord, I think the rule should be discharged.

SANKEY J. having stated the facts, continued: Mr. Sear, relying upon s. 10 of the Land Settlement (Facilities) Act, 1919, says that the order of October 9 is invalid because the consent of the Board of Agriculture has to be obtained before the making of such an order, and that the consent was not given till November 20. The County Council contend that the consent of the Board of Agriculture was not a condition precedent to the making of the order, but only to the acquisition of the land, and that therefore the consent given on November 20 was proper and sufficient, and that their proceedings are right. This depends upon a proper construction of the Small Holdings and Allotments Act, 1908, and the Land Settlement (Facilities) Act, 1919. They argue that though under the 1908 Act they were entitled to make an order, it was not operative until submitted to and consented to by the Board, yet that this position has been altered by the 1919 Act, under which they contend they are entitled to make an order without submitting it to the Board for their consent, but cannot actually acquire the land till they have obtained such consent.

The question which of these positions is correct depends upon the true construction of s. 39 of the first Act and ss. 1 and 10 of the second Act. The scheme for the acquisition of land in the first Act is contained in Part III. thereof and is in a series of sections from 38 to 43 headed "Acquisition of Land." It must be remembered that apart from this Act a county council had no power to purchase land for the purposes in question. Before discussing the sections it is necessary to observe that there is a great difference between acquiring powers and exercising powers, and putting it briefly it may be stated that the first of the two Acts placed a fetter

upon the acquisition of powers by a county council and the second placed a fetter upon the exercise of such powers. The Act of 1908 points out the way in which a county council can obtain powers to acquire land; two steps are necessary: (1.) the making of an order by them adopting the Lands Clauses Act; (2.) the submission of such order to the Board of Agriculture and its confirmation by them (see s. 39, sub-ss. 1 and 3). The Act of 1919 repealed one of the steps necessary for acquiring powers—namely, the submission of the order to and its confirmation by the Board of Agriculture (s. 1, sub-s. 1), but it introduced by s. 10 a fetter upon the exercise of powers which had not existed before; that is to say, it rendered the consent of the Board necessary to the exercise of powers. There was probably good reason for this when it is remembered that the State was financing county councils who were acquiring land and would therefore naturally stipulate for the consent to be given by them to the council before it exercised the powers.

Summing up, it appears to me that the effect of the second Act is that it is not now necessary to obtain the consent of the Board to an order for the acquisition of the powers although it is necessary to get the consent of the Board for the exercise of the powers. In the result, and in my view, the procedure pursued by the County Council was the correct one, and the consent of the Board of Agriculture was not required for the order of October 9, and this rule must be discharged.

The last observation I desire to make is that the opinion of my Lord, Mr. Justice A. T. Lawrence, causes me the only doubt I have as to the correctness of my own view.

Rule discharged with costs.

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

NOTE.

SMALL HOLDINGS AND ALLOTMENTS ACT, 1908.

PART I.

Small Holdings.

. . . . . .

Sect. 1: A county council may if they are of opinion that there is such a demand for small holdings in their county as justifies them in putting into operation this Part of this Act, and shall, if so required by a scheme under this Act, provide small holdings for persons who desire to buy or lease and will themselves cultivate the holdings.

Sect. 7: (1.) A county council may, for the purpose of providing small holdings for persons who desire to buy or lease and will themselves cultivate the holdings, by agreement purchase or take on lease land, whether situate within or without their county.

(2.) If a county council are unable to acquire by agreement and on reasonable terms suitable land for the purpose of providing small holdings for persons who desire to lease small holdings, they may for that purpose acquire land compulsorily in accordance with the provisions of this Act relating to compulsory acquisition of land.

PART III.

General.

Acquisition of Land.

Sect. 38: For the purpose of the purchase of land by agreement under this Act by a council, the Lands Clauses Acts (1) shall be incorporated with this Act, except the provisions of those Acts with respect to the purchase and taking of land otherwise than by agreement, and section one hundred and seventy-eight of the Public Health Act, 1875, shall apply as if the council were referred to therein.

Sect. 39: (1.) Where a council propose to purchase land compulsorily under this Act, the council may, subject to the provisions of Part I. of the First Schedule to this Act, submit to the Board [of Agriculture and Fisheries] an order putting in force as respects the land specified in the order the provisions of the Lands Clauses Acts (1) with respect to the purchase and taking of land otherwise than by agreement.

(3.) An order under this section shall be of no force unless and until it is confirmed by the Board, and the Board may, subject to the provisions of the First Schedule to this Act, confirm the order either without modification or subject to such modifications as they think fit, and an order when so confirmed shall become final and have effect as if enacted in this Act; and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act.

FIRST SCHEDULE.

PART I.

Provisions as to the Compulsory Acquisition of Land by a Council.

(1.) The order shall be in the prescribed form, and shall contain such provisions as the Board may prescribe for the purpose of carrying the order

(1) See note (1) ante, p. 466.

into effect, and of protecting the council and the persons interested in the land, and shall incorporate, subject to the necessary adaptations, the Lands Clauses Acts and ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845. . . . .

. . . . . .

(7.) In construing, for the purposes of this Schedule or any order made thereunder, any enactment incorporated with the order, this Act together with the order shall be deemed to be the special Act and the council shall be deemed to be the promoters of the undertaking.

LAND SETTLEMENT (FACILITIES) ACT, 1919 [August 19, 1919.]

Title: An Act to make further provision for the acquisition of land for the purposes of small holdings, reclamation, and drainage, to amend the enactments relating to small holdings and allotments, and otherwise to facilitate land settlement.

PART I.

Provisions as to the Acquisition of Land.

Sect. 1: (1.) Any order for the compulsory acquisition of land which is duly made after the date of the passing of this Act and before the expiration of three years from that date by a council under the Small Holdings and Allotments Act, 1908 (hereinafter referred to as the principal Act), need not, except as otherwise expressly provided by this Act, be submitted to or confirmed by the Board of Agriculture and Fisheries, but shall have effect as if it had been so confirmed:

Provided that a grant or inclosure of common purporting to be made under any such order shall not be valid unless it is made with the consent of the Board, given under and in accordance with the provisions of section twenty-two of the Commons Act, 1899.

(2.) Notice of the making of an order to which this section applies shall be given in the prescribed form and manner by the council as soon as practicable to each owner, lessee and occupier of the land authorised to be acquired, and a copy of the order and of any plan annexed or referred to in the order shall be furnished by the council to any person interested in the land, on application by such person.

The marginal note to that section is as follows: Temporary suspension of requirements as to confirmation of orders for the acquisition of land.

Sect. 10: (1.) The power of a council to acquire land for small holdings under the principal Act shall not be exercised during the period ending on the thirty-first day of March, nineteen hundred and twenty-six, except with the previous consent of the Board of Agriculture and Fisheries, or after the thirty-first day of March, nineteen hundred and twenty-six, except at such a price or rent or for such an annuity as, in the opinion of the council, will allow all expenses incurred by the council in relation to the land to be recouped out of the purchase money or rent to be obtained by the council for the land.

(3.) This section shall be deemed to have had effect as from the first day of January nineteen hundred and nineteen.

1920

REX v. BEDFORDSHIRE COUNTY COUNCIL, *Ex parte* SEAR.

SMALL HOLDINGS AND ALLOTMENTS (COMPULSORY PURCHASE) REGULATIONS, 1919.

[Dated September 8, 1919, and made by the Board of Agriculture and Fisheries.]

1. A compulsory order for purchase made by a council shall be in the form set forth in the Appendix to the Regulations or to the like effect: Provided that an Order, if submitted to the Board of Agriculture and Fisheries (in these Regulations referred to as the "Board") for confirmation may be modified by the Board after notice of the intended modification to the Council and to those persons interested in the land who, in the opinion of the Board, would be affected thereby, and after consideration of any objection thereto presented to the Board within the time prescribed by such notice.

8. In these Regulations, unless the context otherwise requires . . . . "Compulsory Order" means an Order under the Small Holdings and Allotments Acts, 1908 and 1919, which authorises land to be compulsorily purchased; . . . .

APPENDIX.

1. The [County Council of] are hereby empowered for the purpose of providing "small holdings" or "allotments" to put in force as respects the [several] land[s] described in the Schedule hereto the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement, but subject to the terms of the Small Holdings and Allotments Acts, 1908 and 1919, and this Order.

2. This Order shall take effect as if it incorporated subject to the necessary adaptations the Lands Clauses Acts and ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845. . . . .

5. The powers conferred by this Order shall cease after the expiration of one year from the date hereof unless such period is extended by the Board of Agriculture and Fisheries.

Made by the the day of .

. . . . . .

After the passing of the Act of 1919, and before the making of the above Regulations, the Board of Agriculture and Fisheries, by their clerk, issued to all the councils concerned, and among them to the Bedfordshire County Council, a circular letter dated August 28, 1919, which was in part as follows:—

LAND SETTLEMENT (FACILITIES) ACT, 1919.

SIR,

1. I am directed to call the special attention of your Council to the provisions of the Land Settlement (Facilities) Act, 1919 . . . .

. . . . . .

Acquisition of Land.

3. The powers of Councils to acquire land compulsorily and to obtain vacant possession of land acquired by agreement are strengthened very considerably by the new Act. For a period of three years from the passing of the Act orders made by Councils for the compulsory purchase or hiring of land will not have to be confirmed by or receive the consent of the Board, except in those cases where the land is subject to rights of common (proviso

to s. 1 (1.) and s. 28) or where the land forms part of a park or home farm or of a "small holding" as defined in s. 61 (1.) of the Act of 1908 (s. 16).

. . . . . .

Control by the Board.

18. The new Act contains a provision (s. 10) requiring Councils to obtain the approval of the Board before acquiring any land during the period up to 31st March, 1926, and Councils should therefore continue to submit their proposals in regard to the acquisition of land to the Board for their approval. The position in this respect is, for all practical purposes, the same as has been customary in the past, ...

19. I am to point out that the necessity of obtaining the Board's consent before land is acquired applies to land which is acquired compulsorily as well as to land acquired by agreement. Councils can obtain compulsory powers in respect of any land (subject to the exceptions mentioned in para. 3 of this letter) without reference to the Board, but they must not exercise those powers of the service of notices to treat or of notices to enter and take possession without first consulting the Board. . . . .

J. R.

[IN THE COURT OF APPEAL.]

C. A.

1919 *Nov.* 27, 28; *Dec.* 5.

1920 *March* 1.

BELVEDERE FISH GUANO COMPANY, LIMITED *v.* RAINHAM CHEMICAL WORKS, LIMITED, FELDMAN AND PARTRIDGE.

IND, COOPE & COMPANY, LIMITED *v.* SAME.

Nuisance—Negligence—Dangerous Trade—Manufacture of High Explosives—Explosion causing Damage to adjacent Property—Liability of Manufacturers.

In August, 1915, F. and P., who were interested in a novel process for making picric acid, a high explosive, from di-nitro-phenol (D.N.P.), entered into an agreement with the Minister of Munitions to manufacture for him picric acid at Rainham, in Essex. The contractors, as agents for the Minister, were to erect works for the purpose, the buildings, plant and machinery to be paid for by the Minister and to remain his property. The Minister was to deliver D.N.P. and other materials to the contractors, who were on their sole responsibility, and at their risk, to convert it into picric acid at an agreed price.

On March 17, 1916, the Rainham Chemical Works, a private company, formed by F. and P., was incorporated, with a capital of 5000*l.* in 100,000 shares of 1*s.* each, for the purpose of acquiring and carrying on the undertaking. F. and P. were appointed governing directors, and were

C. A.

1919

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE.

IND, COOPE AND COMPANY v. SAME.

the sole signatories of the memorandum of association. The shares were issued as fully paid up. F. and P. having taken a lease of land at Rainham erected a factory thereon, and transferred it, together with the benefit of their agreement with the Ministry, to the company, who carried on the manufacture of the explosives. Large quantities of D.N.P. were delivered at the factory by the Minister, and stored in close proximity to other materials which were highly inflammable. It was not at the time known that D.N.P. was likely to explode, but it was proved that on being subjected to great heat it would do so.

On September 14, 1916, a fire broke out, and an explosion of D.N.P. occurred at the factory causing damage to neighbouring property. In an action by the owners thereof claiming damages against the company and F. and P. on the ground (1.) of liability under the doctrine of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, (2.) common law nuisance, and (3) negligence :—

Held, by the Court of Appeal (Lord Sterndale M.R., Atkin L.J. and Younger L.J.), (1.) that the plaintiffs were entitled to recover damages against the company; and (2.) (Younger L.J. dissenting) that F. and P. were also personally liable for bringing the dangerous substance upon the premises without taking the necessary steps to preserve it harmless. The fact that they had put the actual manufacture into the hands of the company of whose operations they were in complete control did not relieve them of liability.

Principle of *Rylands* v. *Fletcher* applied.

Decision of Scrutton L.J. sitting as an additional judge of the King's Bench Division affirmed.

APPEALS from the decision of Scrutton L.J. (sitting as an additional judge of the King's Bench Division) in two actions arising upon the same state of facts.

The plaintiffs in both actions claimed damages against the defendant company and two of its directors named Feldman and Partridge, for loss and injury to their properties by an explosion at the company's chemical works.

Scrutton L.J. held in both actions, on the principle of *Rylands* v. *Fletcher* (1), that the company (which was in liquidation) was liable for the damage caused by the explosion, and further that the defendants Feldman and Partridge were also personally liable for the same.

The defendants appealed, the two appeals being heard together.

The facts were stated in the judgment of the Master of the Rolls as follows :—

Two Swiss gentlemen, Dr. Maron and Dr. Wyss, possessed a

(1) L. R. 3 H. L. 330.

process for the manufacture of picric acid from di-nitro-phenol (known as D.N.P.), a substance which up to that time had been used chiefly for dyeing purposes. In some way they were brought into connection with the defendants, Feldman, a retired solicitor, and Partridge, a fine art dealer, who agreed to find capital for developing the invention. They then got into communication with the Ministry of Munitions, through Lord Moulton, at that time the Director-General of Explosives Supply. Two other persons, named Bertrand and De Gerde, were associated with them in the matter, and were to receive some part of the profits if the venture proved successful. They are, however, of no importance in the case, and are only mentioned because their names appear from time to time. On July 14, 1915, an agreement was made between Maron of the first part, Wyss of the second part, and Partridge, Feldman and De Gerde of the third part, providing that Maron and Wyss should give their services in the manufacture of picric acid, subject to the payment of a royalty by His Majesty's Government; and should each receive $12\frac{1}{2}$ per cent. of the profits of the manufacture. Partridge, Feldman and De Gerde were to find the capital. In fact, De Gerde never found any, and dropped out of the transaction. The agreement concluded with the following clause: "In the event of a Company with limited liability being formed to work this business then the percentage of profits payable to the said David Maron and George Wyss shall be represented by shares." On August 24, 1915, an agreement was made by the Minister of Munitions of the one part and Bertrand, Maron, Wyss, Feldman, Partridge and De Gerde, called the Contractors, of the other part, for the manufacture of picric acid from D.N.P., by which the contractors were, as the agents of the Minister of Munitions, to erect or adapt at their works at Rainham, buildings, plant and machinery to be paid for by him, and to remain his property. The Minister of Munitions was to deliver D.N.P. and nitrate of soda and other materials at his cost to the contractors, who were to convert the same into picric acid on their sole responsibility and sole risk, and to receive an agreed price for it. The D.N.P. was to be delivered to the contractors

C. A. 1919

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

at their works at Rainham; and the Minister of Munitions had the right to send inspectors to the works of the contractors during the period of manufacture. The Minister of Munitions also agreed to pay rent for the factory; but Bertrand was informed later that it was not a Government factory, and was not to be called by any name which suggested that it was a Government factory. The contractors agreed to provide the services of Maron and Wyss free of cost; and were allowed, after supplying to the Minister of Munitions the amount of picric acid specified in the agreement, to manufacture that substance for the French, Russian, or Italian Governments. This agreement was signed by Lord Moulton on behalf of the Minister of Munitions. The contractors at that time had no works; but on September 10th, 1915, Feldman, Partridge and De Gerde took a lease from J. C. & J. Field, Ld., of what was afterwards known as the Rainham Chemical Works. The lease contained a covenant by the lessees "Not to assign or underlet or part with the possession of the said premises or any part thereof without the previous consent in writing of the company except to a department of His Majesty's Government." The lessees proceeded to erect buildings and plant on the site, in accordance with the agreement they had made with the Minister of Munitions; and that part of the premises on which these buildings and plant were erected was, by the desire of the Minister of Munitions, separated from the other part of the works by a fence. Some stress was laid upon the fact of this division in the argument for the appellants; but I have been unable to see that it has any bearing on the question before us. With regard to these agreements, the appellants contended that under them they were acting solely as agents for the Minister of Munitions in the manufacture of picric acid; and that as he could not be liable for any damage occasioned by such manufacture, they were as his agents equally exempt from liability. The agreement of August 24, 1915, is by no means easy to understand; and some expressions—for example, the stipulation that the contractors were to receive 2*d.* per lb. of picric acid for their services—are such as might well be used in a contract of agency; but on the

whole, I do not think the contractors were merely agents, but that they were, as they are called, contractors who supplied the picric acid at a price specified in the agreement, while the Minister of Munitions helped them in the finance of the operations by supplying materials and bearing part of the rent which the contractors had to pay to their lessors.

In the agreement of July 14, 1915, it was contemplated that a limited company might be formed to carry on the manufacture of picric acid; and accordingly, in the beginning of 1916, Feldman and Partridge formed a company for that purpose, called the Rainham Chemical Works, Ld. The Memorandum of Association of the company was dated March 6, 1916, and the company was registered on March 17, 1916. The memorandum was very wide in its terms; but the only intention in forming the company was that it should carry out the manufacture of picric acid undertaken by Feldman and Partridge. The whole paid-up capital of the company was 2*s.*, and the shares were distributed fully paid up amongst those interested in the matter. Feldman and Partridge were the only subscribers to the memorandum and articles. The only articles it is necessary to read are as follows: Art. 2. "The Company shall forthwith adopt and carry into effect with or without modification, an Agreement the draft of which has already been prepared, and is expressed to be made between David Maron and others of the one part and the Company of the other part, and an Agreement the draft of which has already been prepared and is expressed to be made between Samuel Jones Feldman and another of the one part and the Company of the other part, which draft Agreements for the purposes of identification have been signed by Howard Percy Becher as Solicitor for the said Company. The Company is formed on the basis that the said Agreements shall be adopted with or without such modification as aforesaid, and no objection shall be taken to the said Agreements, or either of them, nor shall any promoter, Governing Director or Director be liable to account to the Company for any profit or benefit derived by him under the said Agreements, or either of them, by reason of any promoters, Governing

C. A. 1919

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Directors or Directors of the Company being vendors to the Company or otherwise interested in the said Agreements, or either of them, or by reason of the purchase consideration having been fixed by the vendors without any independent valuation having been made, or of the Board of Directors not being in the circumstances an independent Board, but every Member of the Company, present and future, shall be deemed to have notice of the provisions of the said Agreements and to have assented to all the terms thereof." Then Art. 12: "Robert William Partridge and Samuel Jones Feldman shall be the first Governing Directors of the Company, and shall both be entitled to hold office so long as they each hold 20 per cent. of the original share capital of the Company, and in the event of one of them vacating office by death, resignation or otherwise, the other shall, subject as hereafter provided, be the sole Governing Director and shall be entitled to hold office so long as he holds 20 per cent. of the original share capital of the Company." Then 13: "If either the said Robert William Partridge or Samuel Jones Feldman dies whilst holding the office of Governing Director his legal personal representative or representatives so long as 20 per cent. of the original share capital of the Company stands in his or their names may by writing appoint any person to be a Governing Director in his place, and such appointee shall have all the powers which the deceased Governing Director had. Such appointee shall be removable at any time by such legal personal representative or representatives and another person appointed in writing by him or them in the place of the appointee so removed." Art. 14 is: "The said Robert William Partridge and Samuel Jones Feldman whilst holding office as Governing Directors and after one of them vacates the office of Governing Director the other whilst holding office as sole Governing Director shall have full control of the business of the Company. They or the surviving or continuing sole Governing Director shall have power to appoint and remove any other Director or Directors, and may appoint any person in addition to any existing Directors, and may from time to time and at any time appoint, define, limit and restrict

the powers and duties and fix the qualification and remuneration of any other Directors, and remove any Director however appointed, and may at any time convene a General Meeting of the Company, and one of them shall be the chairman of the Board of Directors. So long as the said Robert William Partridge and Samuel Jones Feldman, or one of them, shall be Governing Directors or sole Governing Director of the Company no other Director or Directors of the Company shall be appointed without the consent of such Governing Directors or sole Governing Director." Feldman and Partridge thus had absolute control of the company, and were appointed governing directors, with absolute security of permanent power.

Two agreements were then made with the company, both bearing date March 22, 1916. The first was made between Maron, Wyss, Partridge, De Gerde, Feldman and Bertrand, called the vendors of the one part, and the company of the other part; and by it the vendors agreed to sell to the company the benefit of the agreement with Maron and Wyss, and the benefit of the agreement with the Minister of Munitions. The consideration was the allotment of fully paid-up shares representing the agreed proportions of profits of the respective vendors. By the second agreement Feldman and Partridge agreed to sell to the company (1.) the lease from J. C. & J. Field; (2.) the buildings erected by the vendors and the machinery, plant, etc. This does not seem consistent with the agreement with the Minister of Munitions, but it may mean only the interest of Feldman and Partridge in them. The consideration for the sale was the payment by the company to Feldman and Partridge of the capital advanced and to be advanced by them. Until this was paid, the purchase was not to be completed, but the company were allowed to go into possession; and it was stipulated that the company were to be tenants to Feldman and Partridge, and that until completion the company should be deemed to be retaining possession of the said premises, machinery and plant as agent of Feldman and Partridge. There was no assignment of the lease, but only an agreement to assign when the purchase money was paid; and no consent to any assignment or

C. A. 1919

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

subletting of the premises was obtained from the lessors. This is expressed by the solicitor to Feldman and Partridge in a letter of April 6, 1916, in which he says, writing to Messrs. J. C. & J. Field, Ld.: "Capt. Church has forwarded me your letter to him of the 20th ultimo. It is correct that a Company has been formed under the above title with a capital of 5000*l.* for the purpose of defining the interests of the parties in the business of the manufacture of picric acid which is being, or is about to be, carried on at the works rented from you under the Agreement of the 10th September, 1915. I am aware that Messrs. Feldman, Partridge and De Gerde, the tenants under that Agreement, are precluded from assigning or underletting the premises without your previous consent in writing, and nothing of course has so far been done as regards any assignment or underletting. I now beg to make formal application for your consent to the assignment of the agreement to the above Company. You will, of course, appreciate that such assignment does not in any way release Messrs. Feldman, Partridge and De Gerde from their liabilities under the Agreement. So long as the agreement is in existence they remain personally liable for the payment of the rent and the performance and fulfilment of the covenants and agreements contained therein." It appears from the evidence that the company was formed partly as a method of distributing the profits in shares which might be realizable and partly in order to limit the liability of the vendors. The process of manufacture did not begin except experimentally till after the company was formed; and then continued until September 14, 1916, when a violent explosion took place, which wrecked a great part of the works, and did very great damage to property, besides causing loss of life. The circumstances of the explosion are so clearly stated by Lord Justice Scrutton that I cannot do better than repeat his statement: "The substance which actually exploded was barrels of Di-nitro-phenol, some tons in weight, called for short D.N.P. This substance had before the war only been used for dyeing; but during the war it was discovered to be useful in the manufacture of picric acid, a high explosive, a new process for the production of which

was being used at the Rainham Works. D.N.P. for an explosive was comparatively safe; it was stable; it did not explode easily by concussion, and it was not easy to ignite. But in fierce heat and in large quantities, it became a very powerful explosive. Apparently the interior portion of each barrel was confined by the exterior; and the fierce heat acting on the confined interior made it expand and explode with great violence and destructive effect. In a place on fire or exposed to risk of fire it was a very dangerous thing, just as T.N.T. was found three or four months later to be in the Silvertown explosion. On the day in question it exploded through fire. . . . . What was proved before me was that close by and in the same room with the D.N.P. nitrate of soda, another ingredient in the manufacture of picric acid, was ground, dried and stored. Nitrate of soda, although itself non-inflammable, contains an excess of oxygen, which if released by adjacent heat adds to the fierceness of an adjoining flame. Bags and boxes which have contained nitrate of soda burn very readily and fiercely if lighted. A room containing such ingredients would, in view of what is now known of D.N.P., be a very risky neighbour for a store of D.N.P. The fire in fact originated in the room where D.N.P. was stored, and in that corner of it where dried nitrate of soda was stored in boxes. The fire spread from there to the barrels of D.N.P. Enough was known of the dangerous nature of D.N.P. for the Works Chemist, Mr. Six, very properly to warn the men at once to run for their lives, and a violent explosion followed almost immediately."

Montgomery K.C. and *Maddocks* for the appellants. If anyone is liable in this case it is the company who were carrying on the business. Feldman and Partridge were only governing directors and had no personal responsibility with regard to bringing the dangerous substance upon the premises. Scrutton L.J. was wrong in treating the company as a mere sham, or as agent of Feldman and Partridge: *Salomon* v. *Salomon & Co.* (1)

(1) [1897] A. C. 22.

C. A. 1919

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE.

IND, COOPE AND COMPANY v. SAME.

The contract was duly assigned by Feldman and Partridge to the company: *Parker* v. *Jones* (1); *Tolhurst* v. *Associated Portland Cement Manufacturers.* (2)

[ATKIN L.J. Is a contract for the manufacture of explosives entered into in time of war between the Government and individual persons assignable ?] No doubt a licence from the Government would be required.

As to the liability of Feldman and Partridge as directors, a director need only take ordinary care. If he has done his best and been misled, the fact that he has allowed something illegal to be done will not necessarily render him liable: *Dovey* v. *Cory.* (3)

A person who commits a tort may be liable, and one who gives directions for its committal may be liable, but no intermediate person in general authority over him is liable: *Stone* v. *Cartwright.* (4)

[Younger L.J. I doubt whether that is of universal application to directors: *Betts* v. *De Vitre* (5); and see *Adair* v. *Young* (6), where there was a diversity of opinion in the Court of Appeal.]

Under the agreement with the Minister of Munitions the contractors were in the position of agents for the Minister. The Minister himself having power under the Prerogative of the Crown and the Defence of the Realm Regulations to bring these dangerous substances on to the land was, apart from negligence, immune from liability, and his immunity must extend to his agents.

Under the Defence of the Realm Act and the Regulations thereunder: see Regs. 2 and 2 (E), the Minister of Munitions had power to store the dangerous substance where it was put: *In re De Keyser's Royal Hotel* (7); and, in the absence of negligence, the doctrine of *Fletcher* v. *Rylands* (8) in such a case as this does not apply: *Vaughan* v. *Taff Vale Ry. Co.* (9);

(1) [1910] 2 K. B. 32, 38.
(2) [1903] A. C. 414.
(3) [1901] A. C. 477.
(4) (1795) 6 T. R. 411.
(5) (1868) L. R. 3 Ch. 441.
(6) (1879) 12 Ch. D. 13.
(7) [1919] 2 Ch. 197.
(8) (1866) L. R. 1 Ex. 265; 3 H. L. 330.
(9) (1860) 5 H. & N. 679.

Canadian Pacific Ry. Co. v. *Roy* (1); *Rickards* v. *Lothian* (2); *Madras Ry. Co.* v. *Zemindar of Carvatenagarum.* (3)

J. B. Matthews K.C. and *Stuart Bevan K.C.* for the respondents, the Belvedere Co. The appellants are not entitled to protection from liability as servants or agents of the Minister of Munitions. They are independent contractors, and as such are not entitled to any protection analogous to that provided for public authorities and officers: *Williams* v. *Golding* (4); *Kent County Council* v. *Folkestone Corporation* (5); *Tilling* v. *Dick, Kerr & Co.* (6)

It has been held in numerous cases that officers of the Crown and their subordinates are personally liable for damages caused by collisions and other acts: *Madrazo* v. *Willes* (7); *Nicholson* v. *Mounsey* (8); *Tobin* v. *The Queen* (9); *Rogers* v. *Rajendro Dutt* (10); *Feather* v. *The Queen* (11); *Le Caux* v. *Eden* (12); *Faith* v. *Pearson* (13); *The Mentor* (14); *The Acteon* (15); *The Volcano* (16); *Harrison* v. *The Queen.* (17)

The explosion was due not to the inherent nature of the D.N.P. but to the locality where it was placed. It is said that no action can be maintained for loss which is the necessary consequence of an authorized thing being done in an authorized manner. But in order to secure this immunity the powers conferred by statute must be exercised without negligence or with judgment and caution: *Vaughan* v. *Taff Vale Ry. Co.* (18); *Attorney-General* v. *Gas Light and Coke Co.* (19); *London, Brighton and South Coast Ry. Co.* v. *Truman* (20); *Gas Light and Coke Co.* v. *St. Mary Abbotts Vestry.* (21)

Assuming that the company was a real company, and Feldman and Partridge were directors, whether or not a master

(1) [1902] A. C. 220.
(2) [1913] A. C. 263.
(3) (1874) L. R. 1 Ind. App. 364.
(4) (1865) L. R. 1 C. P. 69.
(5) [1905] 1 K. B. 620.
(6) [1905] 1 K. B. 562.
(7) (1820) 3 B. & Al. 353.
(8) (1812) 15 East, 384.
(9) (1864) 16 C. B. (N. S.) 310.
(10) (1860) 13 Moo. P. C. 209.
(11) (1865) 6 B. & S. 257, 296.
(12) (1781) 2 Doug. 594.
(13) (1816) 6 Taunt. 439.
(14) (1799) 1 C. Rob. 179.
(15) (1815) 2 Dods. 48.
(16) (1844) 2 Wm. Rob. 337.
(17) (1856) 10 Moo. P. C. 201.
(18) 5 H. & N. 679.
(19) (1877) 7 Ch. D. 217.
(20) (1885) 11 App. Cas. 45.
(21) (1885) 15 Q. B. D. 1.

C. A. 1919

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE.

IND, COOPE AND COMPANY v. SAME.

is liable for the wrongful acts of his servant the servant is always liable: Pollock on Torts, 10th ed., 77; *Eaglesfield* v. *Marquis of Londonderry* (1); *Michael* v. *Alestree* (2); *Perkins* v. *Smith* (3); *Stephens* v. *Elwall* (4); *Betts* v. *De Vitre* (5); *La Société Panhard et Levassor* v. *Panhard Levassor Motor Co.* (6)

It is submitted therefore that the appellants are liable as directors of the company.

The ignorance of those who handle dangerous things does not excuse them from the consequences. Persons who deal with specially dangerous things have a special duty. Anyone who assumes to take control of dangerous things, or a business involving it, cannot escape from liability by saying that he was doing it for the benefit of another by whom he was paid to do it.

The appellants, who were in control of the company, are liable: *West* v. *Bristol Tramways Co.* (7); *Musgrove* v. *Pandelis.* (8)

The establishment of this dangerous manufacture in the neighbourhood of streets, houses and dwelling places renders the defendants liable as for a nuisance: *Reg.* v. *Lister* (9); *Hepburn* v. *Lordan* (10); *Crowder* v. *Tinkler.* (11)

A person who has established a nuisance on his premises cannot escape liability by transferring them to another unless (1.) the transferee is independent of his control, and (2.) the business is capable of being carried on without being a nuisance.

A person is liable for the continuance of a nuisance which he has originally created, and which in the nature of things is likely to be continued and is continued, although he has ceased to be in possession of, or has no power to remove it without being guilty of trespass: *Roswell* v. *Prior* (12); *Rex* v. *Pedly* (13); *Rich* v. *Basterfield.* (14)

(1) (1876) 4 Ch. D. 693.
(2) (1676), 2 Lev. 172.
(3) (1752) 1 Wils. (K. B.) 328.
(4) (1815) 4 M. & S. 259.
(5) (1868) L. R. 3 Ch. 441; (1873) L. R. 6 H. L. 319.
(6) [1901] 2 Ch. 513, 516.
(7) [1908] 2 K. B. 14.
(8) [1919] 2 K. B. 43, 47.
(9) (1857) Dears. & B. C. C. 209.
(10) (1865) 2 H. & M. 345.
(11) (1816) 19 Ves. 617.
(12) (1702) 12 Mod. 635, 639.
(13) (1834) 1 Ad. & E. 822.
(14) (1847) 4 C. B. 783.

Further, we submit that the company was a sham, and the agreement was not assignable. The transfer of the contracts to the company was never recognized by the Ministry of Munitions, who looked to the contractors alone. Scrutton L.J. was right in giving judgment for the plaintiffs on the doctrine of *Rylands* v. *Fletcher* (1), and he would have been right in giving it on the ground of common law nuisance.

J. G. Hurst K.C. and *Joy* for the respondents in the second appeal.

Montgomery K.C. in reply.

1920. Mar. 1. LORD STERNDALE M.R. This appeal from Lord Justice Scrutton, sitting as an additional judge of the King's Bench Division, raises a difficult question as to the liability for the consequences of a disastrous explosion, which took place at Rainham, in Essex, on September 14, 1916. There were three defendants: the Rainham Chemical Works, Ld., Mr. Samuel Jones Feldman and Mr. Robert William Partridge. The substantial question is as to the liability of the last two defendants; the liability of the limited company is a matter of small interest to anyone, as it is in liquidation, and its paid-up capital was 2s., while all the shares in the company were issued as fully paid up. The company, therefore, is only important so far as its existence and operations bear on the liability of the other defendants.

The circumstances in which the explosion happened are, so far as it is necessary to state them, as follows. [The Master of the Rolls stated the facts as above set out and continued:] The question for determination is which, if any, of the defendants are liable for the consequences of this explosion. The plaintiffs based their claim on three grounds: (1.) The principle of *Rylands* v. *Fletcher* (1.); (2.) nuisance; (3.) negligence. Under the principle of *Rylands* v. *Fletcher* (1) a person who brings dangerous substances upon premises and carries on a dangerous trade with them is, in my opinion, liable if, though without negligence on his part, these substances cause injury to persons or property in their neighbourhood. I think

(1) L. R. 3 H. L. 330.

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Lord Sterndale M.R.

it is correctly expressed by Lord Justice Scrutton as follows: "Under that decision the persons responsible for the presence and use of these dangerous ingredients must keep them in at their peril, and are liable, if though without negligence of their own, these substances or their consequences escape and do damage." This liability exists whether the land is or is not owned by the person responsible for the bringing upon it and use of the dangerous substances: see *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (1); and whether he is or is not aware of the danger at the time when he brings and uses them: see *West* v. *Bristol Tramways Co.* (2) In this case the qualities of D.N.P. as an explosive were not accurately known at the time; though the evidence shows in my opinion that the chemists were of opinion that it was not free from danger, it was in fact under great heat a violent explosive; and when kept in proximity to nitrate of soda was a source of great danger in case of fire. I do not think it necessary to consider whether it was negligence so to keep it; and will assume for the purposes of this part of the case that, in the state of knowledge of the qualities of D.N.P., it was not. At any rate, I do not think that such keeping of it was the result of negligence on the part of Feldman or Partridge. They were neither of them chemists; and although they were on the premises from time to time, Feldman fairly often and Partridge very seldom, they had nothing to do with the storing of materials or the other parts of works management, which were under the supervision of persons whom they had every reason to consider as competent. But as I have said, the persons who bring such dangerous substances upon premises must do so at their peril.

The strength of the argument addressed to us on behalf of these defendants was that even assuming the company to be liable under the principle which I have been discussing, they were only concerned as directors, and were, therefore, not personally liable.

In the arguments for the respondents some very wide

(1) [1914] 3 K. B. 772. (2) [1901] 2 K. B. 14.

principles as to the personal liability of directors were stated, which I do not find it necessary to discuss; but as at present advised, I am not disposed to accept them all. I think this case turns upon the relations in fact existing between the company and these defendants. Scrutton L.J. has stated that the agreements with the company were paper shams, and made no difference to the reality. If by this the learned judge meant that the company was not a real entity distinct from the individual members, I regret that I cannot agree; but I do not think that was his meaning. I think that what he meant was that no independent control was exercised by anyone on behalf of the company, whether directors or shareholders, but that the whole matter was under the control of Feldman and Partridge, just as though the company had never been formed; and this I think is correct. Lord Moulton knew of the formation of the company, and did not object; but he declined to recognize it as undertaking the liabilities of Feldman and Partridge to the Minister of Munitions; and they continued to be the persons to whom he looked to carry out the contract they had made.

I think there is considerable ground for saying that the company were acting in the manufacture of picric acid as the agents for Feldman and Partridge, and this is strengthened by the terms of the agreement between the company and its vendors; but I do not think it necessary to rest my judgment on this ground. Assuming the company was not acting as agent for Feldman and Partridge, the position seems to me to be as follows. These defendants had agreed with the Minister of Munitions to manufacture picric acid, which involved the bringing of these dangerous substances upon the premises. They formed the company for the express purpose of carrying out these arrangements; and then having formed it, they assumed complete control of all its operations, knowing perfectly well that such operations could only be carried out upon the premises by means of these substances, though they did not know of their dangerous character. I think in these circumstances they are personally liable for bringing the substances upon the premises, although they had put the actual

C. A.
1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE.
IND, COOPE AND COMPANY v SAME.

Lord Sterndale M.R.

manufacture into the hands of the company. They are in my opinion not in the position of directors whom it is sought to make liable for a negligent act of a servant of the company of which they are directors, but rather in a position analogous to that of directors who have personally authorized the creation of a nuisance by a servant of the company.

It was argued that they were freed from liability because they were acting under statutory powers. I can, however, find no provision in any of the enactments to which we were referred which gives them this protection.

I do not think it necessary to consider the questions of nuisance and negligence, as I think this first ground sufficient to establish the liability of Feldman and Partridge. I think that the decision of Scrutton L.J. must be affirmed, and the appeal dismissed with costs.

In *Ind, Coope & Co.* v. *Rainham Chemical Works, Ld. and Others,* the appeal only raises before us the same question as in the former case, though somewhat different questions also arose at the trial against the decision, on which there is no appeal. The second appeal must also be dismissed with costs.

ATKIN L.J. The first question to be ascertained in this case is whether the plaintiffs established a cause of action against the defendant company. I think that they did. Where a person brings upon land of which he is in de facto possession for purposes of his business dangerous materials which would not naturally be upon the land, he is under an obligation to keep those materials under control, so as not to cause mischief to his neighbours. If they do cause mischief, the neighbour has a cause of action against him for the resulting damage, though no lack of reasonable care or skill on the part of the defendant be proved. The principle of *Rylands v. Fletcher* (1) is wider than this; it is unnecessary to attempt to define its full scope; but in my opinion the decision is sufficient to establish the liability of the company in the present case. That the materials used in the business were dangerous in fact cannot now be disputed. That they were not known to be

(1) L. R. 3 H. L. 330.

dangerous seems to me to be irrelevant: see *West* v. *Bristol Tramways Co.* (1), where the danger of the use of creosote was not known to the defendants. But if the fact were relevant, I have no doubt, for reasons that will presently appear, that the danger of the materials generally and of D.N.P. in particular was known to the responsible officers of the company. The judgment against the company was, therefore, right.

The more substantial question is whether the plaintiffs were entitled to have judgment against the defendants, Feldman and Partridge. It is unnecessary for me to read at length the documents and evidence relevant to the relations of these defendants to the Ministry of Munitions on the one hand and the defendant company upon the other. The effect appears to be that by the agreement of August 24, 1915, these defendants, together with their co-adventurers, hereinafter called the contractors, contracted with the Ministry of Munitions that they would at their works at Rainham manufacture picric acid in accordance with the process known to them from materials, the more important of which, D.N.P., was to be supplied by the Ministry. The plant was to be supplied at the expense of the Ministry; but the contractors were "on their sole responsibility and at their sole risk" to "operate manage and work the same." What the precise relations were of the contractors to the company under the kaleidoscopic agreements of March 22, 1916, it is not easy, and fortunately not necessary, to determine. The contractors "sold" to the company their interest under their agreement with the Ministry of Munitions; and the company undertook to perform and faithfully carry out the whole of the terms and conditions contained in such agreement. Until completion of the purchase the company were to go into possession of the premises, machinery and plant as tenants of the contractors, but were to be deemed to be retaining possession of the premises, machinery and plant as agents of the contractors. The legal effect of this clause has not to be determined. It is clearly established by the evidence that there never was any novation between

(1) [1908] 2 K. B. 14.

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Atkin L.J.

the Ministry, the contractors and the company. The Ministry always held the contractors liable to them: and it was doubtless on this account that the contractors required from the company the obligation to perform the terms of the contract with the Ministry, and an indemnity in respect of the contractors' liabilities thereunder.

In my judgment it follows from the facts stated that these defendants are liable to the plaintiffs. It will be sufficient to refer to *Pickard* v. *Smith* (1) and *Penny* v. *Wimbledon Urban Council* (2) as establishing the appropriate principle of law: "When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions." I apprehend that the principle is equally applicable where the person is under liability by statute or contract to bring dangerous materials on to land: which, if done by himself, imposes upon him the absolute obligation to prevent them escaping so as to cause damage. Can the person who has acquired a tiger, so long as he remains its owner, relieve himself of responsibility by contracting with a third person for its custody? The principle was stated by Pollock C.B. in *Hole* v. *Sittingbourne and Sheernes Ry. Co.* (3) There a railway company authorized by statute to build a bridge across a navigable river contracted with a contractor to have the bridge built. The bridge was so built by the contractor as to obstruct the navigation. The company were held liable. Pollock C.B. said: "The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim 'Qui facit per alium facit per se' applies. Where a person is authorized by Act of Parliament or bound by contract to do particular work, he cannot avoid

(1) (1861) 10 C. B. (N. S.) 470. (2) [1899] 2 Q. B. 72, 78.
(3) (1861) 6 H. & N. 488, 497.

responsibility by contracting with another person to do that work." In that case the learned Chief Baron confines himself to negligence or improper conduct. But if the obligation imposed upon the original party transcends even the obligation to take reasonable care, and is absolute, there is, I apprehend, still less reason for suggesting that he can relieve himself of his liability by contracting to have the obligation performed by a third party. I have already stated that the defendant company were under an absolute obligation to keep the dangerous materials necessarily used in their business under such control as that they should not damage their neighbours' property; and the same reasoning applies to the contractors who had agreed with the Ministry to carry on the business which it is said was carried on in fact by the company. Even if, however, the obligation was not absolute, it cannot be disputed that there is imposed upon a person who contracts to make explosives, which is "work which from its nature is likely to cause danger to others," an obligation to take all reasonable precautions against such danger. This obligation he cannot relieve himself of by contracting with a third party. I am myself satisfied that the company did not take all reasonable precautions. The circumstances under which the D.N.P. was allowed to remain stored in close proximity to nitrate of soda without any adequate precautions against fire appear to me to establish negligence; and negligence in the actual work contracted to be done, and not merely collateral. The evidence is sufficient, in my opinion, to establish this part of the case. That the work was known to be dangerous by the contractors and the company is, if relevant, established. The contract of August 24, 1915, provides for the possibility of explosion, and stipulates that the work is to be conducted at the sole risk of the contractors. As Mr. Feldman stated in evidence, the risk of explosion had crossed his mind. On February 24, 1916, in answer to a letter written on behalf of the contractors, which is not produced, the Ministry wrote in terms which make it plain that the risk of explosion was very present to the contractors' mind; and that they were seeking to vary the original agreement with the Ministry by getting

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Atkin L.J.

the Ministry to indemnify them against this risk. They were told to insure the third-party risk; and the company formed a month afterwards did in fact so insure it. It is in evidence that Dr. Maron, one of the inventors of the process, had warned Mr. Six, a practical chemist employed at the works, to be careful about D.N.P., in reference to its explosive character. The manager, who to the last moment bravely attempted to remove the D.N.P. from the scene of the fire, had no doubt as to the danger, and warned his men to fly. Indeed, it was hardly denied that one of the objects of forming a company was to seek to limit the liability of the contractors in respect of explosion. It was quite a legitimate object; but in my judgment, in a case of this kind, the law does not enable it to be achieved in the manner here adopted.

I have assumed for the purposes of this judgment that the company was a real company, and that the two other defendants did act after its formation in some respects as its directors. As such directors they would not be liable for the negligence of the company's servants to which they were not accessories. I am doubtful whether the negligence in carrying on the business which I have imputed to the company is not negligence for which the defendants as managing directors are responsible; and I do not differ from the ground stated by the Master of the Rolls that the two defendants continued to exercise control, not merely as directors but as original contractors still personally liable to the Ministry. I think that this view is strengthened by the fact that until after the explosion the licence issued by the Home Office under the Explosives Act named as occupiers not the company, but the contractors, under the name adopted by them, of the Rainham Chemical Works. I prefer, however, to rest my judgment on the ground first set out above.

I concur in the view that neither set of defendants establish any statutory protection. The appeal should be dismissed with costs.

YOUNGER L.J. The liability of the appellants, Messrs. Feldman and Partridge, as distinct from that of the appellant

company, for the damage done to the properties of the respondents through the explosion at the Range or Rainham Chemical Works on September 14, 1916, is the main question at issue on these appeals.

I was much struck with the argument in support of the view that the appellant company was not liable. It gained in force by the fact that it focussed attention on the position in the matter of the Ministry of Munitions—one of outstanding prominence; but I agree with my Lord and the Lord Justice in the view that the company cannot be absolved from liability; and I add nothing in respect of that matter to the judgments they have just delivered. With them I respectfully agree.

But the liability of Messrs. Feldman and Partridge—to whom I will hereafter refer as the appellants—depends upon very different considerations, and raises questions of great difficulty for which, I must say, these appellants have themselves largely to thank. They, or their former advisers for them, have chosen to define their relations with their co-contractors on the one hand and with the company on the other in a series of documents gratuitously obscure; and it is no easy task to define their exact legal position in relation to this disaster. Yet, in my judgment, the question of their liability for the consequences of the disaster can only be settled aright if the legal position of all parties is first of all accurately ascertained; and the examination which follows is my attempt to ascertain it.

[The Lord Justice stated the facts leading up to the execution of the preliminary agreements in which the interests of the different parties were in the first instance defined: to the terms of these agreements, including the chemists' service agreement, the agreement for tenancy, and the agreement with the Ministry, in the judgment referred to as the Minister's contract, pointing out incidentally that even in the earliest agreements the ultimate formation of a company to take over all the interests in the venture was in direct contemplation, and that it was difficult to see how except through the convenient machinery of a company the business could have been conducted or the rights of the parties regulated

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

with any satisfaction to any of them. He continued: I have detailed these provisions at this length, not for the purpose of laying the foundation for a discussion of the question how far the Minister's contract made the contractors the agents of the Minister in connection with the manufacture for him of the picric acid thereby provided for, although that point already dealt with by the Master of the Rolls was much canvassed before us and will be again alluded to. I have detailed them in order to emphasize from the agreement itself the fact that the Minister, and not these appellants, was in relation to the erection and adaptation of the works and the conduct of the manufacture and the provision of materials, in effective control of everything; and for the purpose also of showing from the agreement itself how in respect of the permission to manufacture picric acid for Allied Governments the contractors (the expression used to describe collectively Berhaud, Mason, Wyss, and De Gerde with the appellants Feldman and Partridge) were put in the way of making out of the process additional profit for themselves; and how it came about that they set themselves to equip part of their works with that object. And it is convenient at this stage to point out that the Minister in fact exercised all the power and influence which the agreement gave him. The engineers to adapt the works for his purposes were employed on the selection and instructions of the Minister. The plans for the factory were in every detail approved and passed by him. The portion of the factory premises held from Messrs. Field, for which the Minister contributed 100*l.* a month in respect of the rent, was marked off from the rest of the demised property; and in June, 1916, in pursuance of directions from the Minister, was separated from it by a fence with locked gates; upon that reserved piece—in the argument described as the Range works—the factory for the Minister was at his expense adapted and equipped. Except at these Range works no manufacture was, it would appear, ever carried on. The intention was to carry on at the Rainham works on the further side of the fence the manufacture of the acid for permitted export, and considerable progress was made in their

reconstruction, although they were never, it seems, used. The money required was advanced by the appellants, who, it was said, had found, by the time of the explosion at the Range works, as much as 70,000*l.* for that and other purposes of the venture. No question, however, as to these Rainham works arises now. No manufacturing operations had ever taken place except at the Range works, or otherwise than in the service of the Minister's contract. It was there that the explosion took place; and it is with reference to these works that all the questions on the appeals arise.

In March of 1916 the Range works were nearing completion, and the actual commencement of manufacture for the Minister was in prospect. At this stage the contractors proceeded to form the appellant company and to transfer to it their respective interests in the venture. That this scheme was brought to the notice of Lord Moulton, and in no way objected to by him, seems to me clear on the evidence. Mr. Feldman's testimony on the subject is express. Lord Moulton's only objection was to a public issue of capital, and the peculiar capitalization of the company is the compliance with his conditions in that regard. He saw and passed, so Mr. Feldman said, the memorandum and articles of association before they were registered. These were registered and the company was incorporated on March 17, 1916, with its nominal capital of 5000*l.*, divided into 100,000 shares of 1*s.* each. It is a private company, the appellants being the only signatories to the memorandum of association. The articles provide for the adoption and carrying into effect of the two agreements therein referred to, and appoint the appellants governing directors so long as they each hold 20 per cent. of the original share capital; and they are invested as such with full control of the business of the company. This power of control was much relied upon by the respondents, and rightly so. It may, indeed, be the essential fact in the case. I shall have to refer to it again. It is, however, convenient to point out here that as shareholders the position in the company of these appellants was never preponderant although it was very strong. They each held 28½ per cent. of the issued share

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

capital. Accordingly, they could not even by joining forces carry an extraordinary resolution against the other shareholders who were the remaining contractors. The most they could do would be to prevent such a resolution being passed. They could prevent but could not require changes in essential things. [The Lord Justice then referred to the two agreements referred to, both of March 22, 1916, the first between the contractors and the company, and the second of the appellants only of the one part and the company of the other part and in particular drew attention to clause 6 of the second agreement which provided that "until payment of the whole of the said purchase consideration the company shall be deemed to be retaining possession of the premises as agent of the vendors," and continued :] It is not possible to place upon every clause in these agreements a completely satisfactory construction. They are confused; and particularly they fail to distinguish clearly, or perhaps at all, between the appellants' rights in Rainham and the Minister's rights in Range. But it is not, I think, difficult to state their effect with a precision sufficient for present purposes.

Under the first agreement, which really effected transfers of the process and of the contractors' commitments with reference to it, the company as between itself and the contractors was placed in the position of the contractors under the Minister's agreement, and in the position of the appellants under the chemists' service agreement; and the company was placed in those positions at once, completion taking place on March 31 and the indemnity by the company becoming immediately operative. Under the second contract the company took the benefit of the tenancy and of the appellants' expenditure, on the terms of repaying that expenditure out of available moneys; the company was placed in occupation at once, but completion by assignment awaited payment.

Nor is the business position as between the appellants and the company which resulted from these contracts really doubtful. The appellants remained the financiers of the undertaking; the repayment of their advances was to come from the remuneration appertaining to the company from

the Minister's contract and the credit revenue arising from the exported picric acid. In other words, the appellants were to be paid, and the company's undertaking was gradually to be capitalized, out of profits. Indeed, the two agreements reproduced under the company the situation in this respect of the earlier arrangements. And it must, I think, be agreed that if these agreements were operative according to their tenor and were acted upon accordingly, the position of the contractors in relation to the manufacture was thereby fundamentally altered. Nor will it be forgotten that it is the relation in which the appellants as contractors stood to the company at the date of the subsequent explosion, and not that in which they remained with the Minister, which is the vital question with reference to any liability of theirs towards the respondents.

But it was said that these agreements effected no alteration in the legal position of the appellants in relation to the works and manufacture as that position existed prior to their being entered into, and that for three reasons. First it was said that the company got nothing under either of the agreements. It never was more than a bare abstraction without assets, whose existence may be disregarded for all practical purposes. I cannot agree. I think that the following answer in cross-examination of Mr. Feldman correctly stated the position in this respect: "The Company had assets. They had the assignment of the agreement with the Ministry, which would have brought them in an income. They had the use of the plant on the Rainham side, and at that time there were negotiations with regard to the manufacture of picric acid on the Rainham side for the Russian Government by the assistance of Lord Moulton, and which contract was entered into with the Russian Government after the explosion with the consent and assistance of Lord Moulton." Nor do I think that position was displaced by the two remaining arguments on this head put forward by the respondents. The agreement to assign the tenancy to the company was, they said, inoperative, because it was made without any previous consent in writing from Messrs. Field, as required by the

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

landlords' agreement. But there never was any actual assignment; and, as I have already pointed out, the agreement of tenancy contained no prohibition against merely parting with possession, which was all that happened. Further, and more important still, the result of the evidence clearly is, that the landlords by their conduct waived any possible forfeiture on this score.

The respondents' remaining argument on this head was more strongly urged. It was that the Minister's contract was a personal contract incapable of assignment, and that the company took nothing under the first agreement in respect of it. But apart from the question whether the Minister's contract was assignable to such an extent at least as is set forth in the case of *British Waggon Co.* v. *Lea* (1), as I think it was, Mr. Feldman's evidence, as I have already said, was express that the whole scheme of the company taking over the process was brought to the notice of and approved by Lord Moulton. That is not to say that there ever was any such novation of the Minister's contract as, in a question between the contractors and the Ministry, to release the former from personal liability for its performance. But the Ministry indubitably, as it appears to me on the evidence, recognized and accepted the company as the actual manufacturer of its picric acid, knew that it was in actual occupation of the premises, and that it was by the company that the manufacture of picric for the Minister was being carried out, with the ingredients, too—D.N.P. and nitrate of soda—supplied by the Ministry from week to week for that purpose, and actually stored on the premises under the direction of a storekeeper appointed by the Minister and paid by the company. Lord Moulton himself, Major Church the works manager said in evidence, visited the premises a few days before the explosion to inspect some crystallizing plant then being erected by the company under his directions; while his assistance in securing for the company a contract for picric acid from the Russian Government has already been referred to. Nor is it surprising that this should have been

(1) (1880) 5 Q. B. D. 149.

the attitude of the Ministry towards the company. If quoad the performance of the Minister's contract the original contractors or any of them were relied upon by the Ministry for their skill and character the Ministry, retaining as it did their personal liability, lost nothing in consenting to the company's hand being the hand to perform, so long as the two chemists, and particularly Dr. Maron, the real indispensable, remained in charge of the process as before. And in fact with the knowledge and, through Lord Moulton, the approval of the Minister, the company upon March 31, 1916, did really enter into occupation of the Range premises, and commenced manufacture under the Minister's contract immediately afterwards, and, for myself, I cannot doubt that the ultimate personal liability of the appellants for the consequences of the explosion, when it did occur more than five months later, must depend upon a due recognition of that fact.

It is important now to ascertain the actual position as on March 22 or 31, 1916—it matters not which—a critical period in view of one of the respondents' main contentions. Up to that time, as I have said, experimental work had only been carried on under the immediate direction of the two chemists. Neither Mr. Feldman nor Mr. Partridge had any knowledge of chemistry; they took no part in these experiments, nor, as it would appear, did they exercise any control in connection with any practical matters at all. This was certainly true of Mr. Partridge: he remains a shadowy and impassive figure throughout the whole history, while Mr. Feldman's activities were confined, it would seem, to the supervision of finance. No kind of intermeddling on the part of either with the construction or equipment of the factory or the storage of material is shown ever to have taken place. All these things were left, and I should suppose were prudently left to the engineers, the chemists, the works manager, Major Church, a gentleman of high capacity, and the competent staff engaged as above described. Furthermore, from the time when the company took over the works and manufacture, there is no trace of anything being done by anyone outside the Ministry except

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

in the company's name or on its behalf. It was in the name of the company that the employees were engaged or re-engaged. It was against the company that proceedings were taken by a workman for wrongful dismissal. The company was entered in the rate-book in respect of the premises, and was sued for rates; and the company it was which paid the rates and the rent. I can find no suggestion that any act of ownership was, after the company's formation, exercised by any of the contractors, either the appellants or any other. What does appear is that the supervision of the Ministry continued as before. As late as August 31, 1916—a few days before the explosion—we find the Ministry directing the distribution of responsibility in respect of the output and management of the works. Subject to that supervision, it was in the real sense of the word the company which in its corporate capacity entered into and remained at the time of the explosion in occupation of the premises, carrying on operations there in its own name, and on its own account. There was no concealment of any kind, and it is not unworthy of observation that it was against the company only that these actions were in the first instance commenced. It was comparatively late in the course of the proceedings that the appellants, with, in one of the actions, other persons, were added as defendants.

As I view this case, it is to my mind essential never to lose sight of the company's position in relation to this manufacture. The alleged liability of the appellants for this explosion, as two of the original contractors, is one thing; their alleged liability as governing directors of the company is another. The first and most important question upon these appeals must be whether any liability can, on the facts as proved and above set forth, be attached to them at the instance of the respondents, other than such liability as flows from their office under the company, and their conduct in relation thereto.

The explosion took place on September 16, 1916. It was an overwhelming catastrophe, for which no known person can be justly blamed. It was an explosion of the D.N.P. supplied by the Minister under the Minister's contract, and stored on

the Range premises along with the nitrate of soda also so supplied. It has been described by Scrutton L.J. in his judgment. There are four matters in relation to it which are specially relevant to the case of the appellants. The first is, that until this explosion took place, D.N.P. was not regarded by chemists as really, if at all, dangerous. It had for many years been extensively used in the dyeing industry. It was never known to have exploded. It was not registered as an explosive. Even now, with the experience of the Range explosion gained, the evidence is that D.N.P. is much less dangerous than many other accompaniments of ordinary manufacture—for example, dust in a flour mill. The second matter is this: D.N.P. is not capable of spontaneous combustion. It seems certain that there would not in this instance have been any explosion at all had not the D.N.P. been stored in close proximity to the nitrate of soda in a building impregnated with nitrate of soda, an oxydizing agent. And there was no reason in connection with the manufacture why the two commodities should have been so stored; although, as I read the evidence, no one can, in the then state of knowledge, be fairly blamed for having so stored them; and it may have been convenient to do so. It may, perhaps, however, be mentioned that when the company took over, such D.N.P. as there was on the premises was, as it happened, not so stored. The third matter is this. Picric acid is an explosive which has always been registered as such. Its manufacture, doubtless, is a dangerous trade; and in the evidence the precautions against risk taken in constructing the danger zone of the Range factory are described. I have no doubt that the references in the agreements and elsewhere to risk in connection with its manufacture relate to the process itself. But on the occasion in question no picric acid on the premises, either manufactured or in course of manufacture, exploded or even caught fire. In so far as this manufacture was a dangerous trade, the precautions against disaster turned out to be completely effective. The explosion was due entirely to the storage of D.N.P., not in any way to the fact that it was destined for use in a particular manufacture. The damage

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

would have been neither greater nor less if the adjoining works had been, as they might have been, dye-works, or any other works employing that commodity in the course of working. It appeared to me during the argument, and appears to me still, that this very essential matter was overlooked by the respondents' counsel in much that they said. The last matter is this. Actual personal negligence on the part of the appellants or either of them was not suggested. If there was deficiency in the precautions against fire, knowledge of it was not imputed to them personally. Their position throughout, in relation to practical matters, was that which I have above described.

To sum up the whole matter: The liability of the company rests upon the principle of *Rylands* v. *Fletcher* (1), with or without an added element of actual negligence on the part of others—not the appellants—for which the company must accept responsibility. The liability is for storing a dangerous commodity upon its premises without taking the steps necessary to preserve it harmless. That is the duty broken. Are these appellants personally liable to the respondents in respect of the same matter; and if so, on what principle? That is the question.

Liability was suggested on several grounds. First of all, this governing passage in Lord Justice Scrutton's judgment was relied on: "The truth is, the agreements were paper shams, and made no difference to the reality. The persons who controlled the business before, controlled it after the agreement. The persons who found the money before, found it after the agreement. But if there was any reality in the arrangement, at the time of the explosion the company was there carrying on business as agent for Partridge and Feldman by the express terms of the agreement. I answer, therefore, the question: Who was carrying on this dangerous business so as to be liable under the doctrine of *Rylands* v. *Fletcher* (1) for damage done by it, by saying that Feldman and Partridge were carrying it on as principals, and the company as their agent, Feldman and Partridge being

(1) L. R. 3 H. L. 330.

also Governing Directors of the Company in complete control of the business."

Now I am not certain myself that I fully appreciate the Lord Justice's reasoning in that passage. If the agreements were paper shams, I do not quite understand how the company enters into the matter at all, yet judgment was given against it—nor do I understand how these appellants are principals and not owners. Nor again, if the agreements are shams, do I understand how the relations between the parties to them can be fixed by any clause contained in them. I have, however, already given my reasons for holding that the agreements are not shams; and that the formation of the company and the agreements into which it entered cannot be disregarded. In my judgment, and I have gone into the transactions in detail to emphasize this conclusion, they made every difference in the legal position, which must now be ascertained with reference to them.

But perhaps the Lord Justice really based his judgment upon the agreements and the articles of the company as they stand, treating them as a reality, and he held these appellants liable as principals "because," as he says, "the Company was there carrying on business as agent for Partridge and Feldman by the express terms of the agreement." Now, if this be his view, then I am bound to say that in my judgment neither is there any such express term in the agreement, nor have the agreements as a whole as I read them any such effect. The Lord Justice is, I presume, for his express term referring to the passage from clause 6 of the second agreement of March 22, 1916, which I have set out above. But first of all, a reference to that clause shows that it is contained in an agreement to which the other contractors interested in the Minister's agreement are not parties; and which indeed does not relate to the Minister's contract, nor to the Range operations at all. It is, I think, clear that in no sense was the company the agent of the appellants in respect of that Minister's contract. As between the contractors and the company, the benefit with the burden of that agreement had passed to the company. The company were like the assignees

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

of a lease; or perhaps more accurately like under-lessees, who had covenanted to indemnify the original lessees or head-lessees, the contractors, against the obligations of the lease, but were themselves in beneficial occupation. But further, even in terms of this clause 6, the company is merely "deemed to be retaining possession of the premises as agent of the vendors"; and whatever these words may mean, and I confess I can put no plain meaning upon a clause which at its commencement says that the company is a tenant of the same vendors, it is I think clear that the company, while deemed to be retaining possession as agent, is empowered, and indeed under contracts is required, if the whole transaction of transfer is regarded, to carry on business on or with the property, not for the vendors as principals, but for itself. In my judgment, therefore, it is not permissible to make the appellants liable on this ground.

Then it was contended that the appellants were liable as for a nuisance, inasmuch as they had handed over to the company the premises, knowing that a nuisance in the shape of a dangerous trade was going to be carried on there; and *Rex* v. *Pedly* (1); *Roswell* v. *Prior* (2); *Reg.* v. *Lister* (3); *Crowder* v. *Tinkler* (4); *Hepburn* v. *Lordan* (5); were with other cases cited in support of that view. In this part of the respondents' case the transfer to the company was recognized, and the way in which it was sought to use these authorities was this. The appellants it was said constructed the works for the purpose of this dangerous trade; and they handed them over to the company well knowing that they would be used for that purpose. The proposed trade was a nuisance in prospect; and the appellants do not absolve themselves by handing the prospective nuisance over to somebody else. That which seems to me an effective answer to this contention has already been foreshadowed in what has preceded. The damage to the respondents has not flowed from any such nuisance, actual or apprehended. It has resulted solely from

(1) 1 Ad. & E. 822.
(2) 12 Mod. 636.
(3) (1857) 26 L. J. (M. C.) 196.
(4) 19 Ves. 617.
(5) 2 H. & M. 345.

the storage on the premises of D.N.P. in a particular way, commenced in fact under the company after transfer. It could not in my judgment on the evidence be proved even now, it could not with any reason have been even suggested on March 22, 1916, that the storage of D.N.P. simpliciter, was or could become a nuisance the subject either of indictment or injunction as were the different nuisances in the cases cited. But further, the manufacture of picric acid itself has never been a nuisance on these premises, although even if it had been, the fact would not in my judgment in these actions have availed the respondents, inasmuch as the damage for which alone they sue has not resulted therefrom. In fact, however, as I have already pointed out, the precautions taken to eliminate danger from the actual manufacture turned out in these works to be sufficient for the purpose. Whoever was responsible for the construction and working is entitled to the benefit of that. For these reasons I am unable to see how the above authorities, when applied to the circumstances of this case, are of any assistance to the respondents.

Then it is suggested that the appellants are liable, along with the company, to the respondents, on the principle of such cases as *Penny* v. *Wimbledon Urban Council* (1); *Hole* v. *Sittingbourne Ry. Co.* (2); and *Pickard* v. *Smith.* (3) But as I understand the principle of these cases, it is necessary, before it can be applied, that there should be on the part of the defendant—in this case these appellants—some antecedent duty towards a plaintiff, even as one of the public, which subsists throughout the continuance of the work in the course of which the damage sued for was sustained. In the *Wimbledon Case* (1) the duty was not to make a hole in a highway without guarding it: in the *Sittingbourne Case* (4) the duty was not to obstruct the navigation of a river; in *Pickard* v. *Smith* (3) the duty was not to open a cellar flap on a station platform without due protection for passengers likely to use it. But here, as I have already said, the explosion arose entirely from the deposit by the Minister of D.N.P. on the company's

(1) [1899] 2 Q. B. 72.
(2) 6 H. & N. 488.
(3) 10 C. B. (N. S.) 470.
(4) 6 H. & N. 488.

C. A.
1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE.
IND, COOPE AND COMPANY v. SAME.

Younger L.J.

premises. It is difficult to see what duty these appellants individually owed to the plaintiffs in respect of that deposit, or in respect of the care of the D.N.P. after deposit, save, if at all, as managing directors of the company, a position which is entirely outside the contention now under consideration. The liability of the Minister on this head, if he were an ordinary subject and had been sued, would have been easier to follow, for the work originated with and was being done for him. But even for an ordinary originator in the Minister's position, the liability would not be clear. For it must, it seems, in such cases be shown that the possibility of risk is known to the defendants. In *Pickard* v. *Smith* (1), for instance, it had to be alleged and proved, that the defendant knew the platform was likely to be so used; and further difficulties in the respondents' way would be occasioned by such a case as *Ellis* v. *Sheffield Gas Co.* (2) But further the application of the suggested principle to the facts of the present case would carry it very far. Nothing can be more certain than that these appellants never had any suspicion that there was any risk whatever in the storage, as distinct from the manipulation of D.N.P. Nor, as I have shown, is there any real risk in such storage. D.N.P. is not a wild beast, dangerous unless kept under lock and key. At the worst, it is even now only shown to be mischievous if placed amongst highly inflammable materials, and then only under very exceptional circumstances. Isolated, it is quite stable. And no authority was cited to the effect that with reference to such a substance anyone could, on the doctrine of *Rylands* v. *Fletcher* (3), be made liable except the person to whose actual custody the substance was committed; or that in case of chemicals, hitherto regarded as harmless, the views of Farwell L.J. in *West* v. *Bristol Tramways Co.* (4) can be extended to include anyone not being the actual custodian. I can myself see no limit to the application of the principle now under consideration, if it be once conceded that it can go so far as is necessary in this case to carry it. Suppose D.N.P.

(1) 10 C. B. (N. S.) 470.
(2) (1853) 2 E. & B. 767.
(3) L. R. 3 H. L. 330.
(4) [1908] 2 K. B. 14.

were handed by its owner to a chemical manufacturer, say Messrs. Brunner, Mond & Co., for conversion into picric, is he to be liable to a neighbour of Brunner, Mond for any explosion on their premises of that D.N.P., however caused? I cannot think so. And yet I can myself see no difference between such a case and the present, so far as the appellants individually are concerned, except that here the D.N.P. was deposited by the Minister and not by the appellants; that it was to be used by the company for its own purposes or for the Minister's, and not for those of the appellants; and that it never belonged to them in any way. Here, again, I think these appellants escape.

Lastly, it was sought to make them liable as governing directors of the company. But in my judgment no case against them on that score can, on the facts which I have set forth, be established. As governing directors, however extensive their powers, they acted only as agents of the company. In the present case their exercise of relevant power began and ended with the engagement or employment by them on behalf of the company of a competent staff; and personal negligence or want of care on their part not being alleged, I can see no ground of principle on which they can be made liable on this score. *Betts* v. *De Vitre* (1) was cited on this point. I think the explanation of that case probably is, that the real dispute was as to the liability of the company, the further liability of the directors being unimportant. It may, however, have turned upon their personal intervention in respect of the matters complained of. Their separate position, it will be seen, was not raised in the House of Lords (2); and the decision on this point in the Court below has not found its way into the text-books as establishing any general principle; while that principle as to the position of directors in relation to a company is, I think, so well settled as to be beyond dispute.

The truth is, that in such a case as this there is a real temptation to seek to establish liability against people in the position

(1) L. R. 3 Ch. 429. (2) L. R. 6 H. L. 319.

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

of the appellants by suggesting a composite duty to the respondents, proceeding from their position first as contractors, and next, as governing directors of the company whose existence as a real principal is disregarded. This in my judgment is not permissible if the governing principle of *Salomon's Case* (1) is to be loyally applied; and I have given reasons for the view that in this case there is no reason why the Court should be under any temptation to disregard that principle. The application of that case makes such decisions as *Stone* v. *Cartwright* (2) directly in point for the appellants. In my judgment any liability of the appellants to the respondents as contractors must be the same, neither more nor less, as it would have been if they had had no interest in or connection with the company: any liability of theirs as governing directors must be the same, neither more nor less, as it would have been had they never been contractors, and had the company been a public company. An attempt to establish liability by a kind of mélange of the two positions, neither of itself sufficing, is in my judgment inconsistent with principle. And it is for that reason that, while I do not doubt that the actual powers of these appellants in relation to all relevant matters were after the formation of the company as extensive as before; still after the company took over the Minister's contract their powers were, I think, those of its directors only, exercised on behalf of the company, and not otherwise, so far as they were exercised at all. For that reason, I feel myself unable to concur in the ground upon which, as I understand it, my Lord has rested his judgment.

On the whole, I am of opinion that these appellants are entitled to succeed on the appeals and in the actions, I have given my reasons for that opinion, as in duty bound, but with diffidence, in view of the judgments already given by my colleagues and by the Lord Justice Scrutton. At the same time, I have not been sorry to believe that these appellants are entitled to succeed. One cannot fail to sympathize with the respondents in their pecuniary loss; but any responsibility of the appellants for this explosion was technical only;

(1) [1897] A. C. 22. (2) 6 T. R. 411.

there were others whose responsibility was much more immediate: the stone is not to be cast against the appellants that they have enriched themselves out of this venture; and their complete bona fides—appearing as it did in Mr. Feldman's evidence—was not, I think, throughout the proceedings recognized as it deserved to be.

C. A. 1920

BELVEDERE FISH GUANO COMPANY v. RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE. IND, COOPE AND COMPANY v. SAME.

Younger L.J.

Appeal dismissed.

Solicitors: *Rhys, Roberts & Co.; Savory, Pryor & Blagden; Nash, Field & Co., for Reynolds & James, Birmingham.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A. 1920 *March* 10.

YOUNG *v.* LADIES' IMPERIAL CLUB, LIMITED.

Club—Expulsion of Member—Resolution of Committee—Validity—Constitution of Committee.

One of the rules of a ladies' proprietary club provided that if the conduct of any member should, in the opinion of the executive committee, be injurious to the character and interests of the club, the committee should have power to suspend the member from the use of the club and to recommend her to resign, and if she did not do so within a certain time, the committee should erase her name from the list of members, provided that no member could be so suspended or recommended to resign unless a resolution to that effect should have been passed by a certain majority of the members of the committee actually present at a meeting specially convened for the purpose.

Acting under the rule the committee of the defendant club recommended the plaintiff, who was a member, to resign, and, as she did not do so, the committee erased her name from the list of members.

The notice convening the meeting of the committee stated that the object of the meeting was "to report on and discuss the matter concerning [the plaintiff] and Mrs. L.," and it was sent to each member of the committee except one, who had previously intimated to the chairman that she would be unable to attend meetings of the committee.

In an action for a declaration that the plaintiff was still a member of the club:—

Held, (1.) that the omission to summon the absent member of the committee invalidated the proceedings of that body; and (2.) that the

C. A.
1920

YOUNG
v.
LADIES'
IMPERIAL
CLUB.

notice did not state the object of the meeting with sufficient particularity. On both these grounds the plaintiff was entitled to succeed.

Smyth v. *Darley* (1849) 2 H. L. C. 789, and *In re Portuguese Consolidated Copper Mines Co.* (1889) 42 Ch. D. 160 followed.

Decision of Roche J. [1920] 1 K. B. 81 reversed.

APPEAL from the decision of Roche J. (1) in an action whereby the plaintiff claimed: (1.) an injunction to restrain the defendants from suspending her from membership of the club, and from erasing her name from the list of members; (2.) a declaration that she was still a member of the club; and (3.) damages.

The facts are stated in the report in the Court below, and further appear from the judgments of the Court of Appeal.

The substantial question arising on the appeal was whether a meeting of the executive committee of the club, at which the plaintiff's name was erased from the list of members, was a properly constituted meeting, having regard to the fact that one member of the committee had not received any notice thereof.

Roche J. held that the meeting had been properly convened, and dismissed the action.

The plaintiff appealed.

Jowitt for the appellant. When the committee of a club are exercising the power of expelling a member the rules by which that power is given must be strictly complied with. That has not been done in this case. Rule 42, which gives the power, expressly provides that no member can be expelled except by a majority of two-thirds of the members of the committee actually present at a meeting specially convened for the purpose. That rule cannot be complied with unless all the members of the committee have had due notice of the meeting. *Labouchere* v. *Earl Wharncliffe* (2); *Smyth* v. *Darley*. (3)

It is admitted that one member of the committee, the Duchess of Abercorn, was not summoned to the meeting, but it was contended that it was unnecessary to send her a notice, she having intimated, when she consented to remain

(1) [1920] 1 K. B. 81. (2) (1879) 13 Ch. D. 346, 352.
(3) 2 H. L. C. 789, 803.

a member of the committee, that she would be unable to attend the meetings of that body. But she could not waive her right to notice: *In re Portuguese Consolidated Copper Mines.* (1) Moreover, the agenda were not sufficiently stated in the notice. That is very important when such a question as the expulsion of a member is to be dealt with. Roche J., in holding that the notice was sufficient, relied upon the opinion expressed by Lord Romilly in *Richardson-Gardner* v. *Fremantle.* (2) But that was a very different case from the present, where there is no evidence that all the members of the committee knew what was going to be done at the meeting.

Sir Ellis Hume Williams K.C. and *G. A. Scott* for the respondents. Rule 42 provides for a two-thirds majority of the members of the committee actually present.

[WARRINGTON L.J. That renders it all the more necessary that all the members should be summoned.]

There was evidence in this case that it would be useless to send a notice to the Duchess of Abercorn. When a member is not within a summonable distance it is not necessary to send him a notice. So in the case of a member who is too seriously ill to attend. It would be dangerous to hold in a case like this that the failure to summon a member, who it was known would not attend, vitiated all the proceedings of the meeting. This is purely a question of the internal management of a proprietary club with which the Court will not interfere. It is not like the case of a public company where matters must be more strictly regarded: *Kaye* v. *Croydon Tramways Co.* (3) There was evidence to support the finding of the learned judge as to the necessity for summoning the duchess. She was not, in fact, an acting member of the executive committee.

In *Smyth* v. *Darley* (4) a duty was imposed by statute to serve every magistrate. That is not applicable to a case like this. There was here no miscarriage of justice. The agenda upon the notice were sufficient having regard to what was well known to all the members of the committee. There was no

(1) 42 Ch. D. 160, 167.
(2) (1870) 24 L. T. 81, 86.
(3) [1898] 1 Ch. 358, 368.
(4) 2 H. L. C. 789, 803.

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB.

breach of the rules such as to induce the Court to hold that the proceedings of the committee were ultra vires and invalid. Under r. 41 the proprietors of the club have power to return the subscription of a member and to prohibit her further use of the club. They might have acted under that rule, and the result would have been the same.

LORD STERNDALE, M.R. This case raises a short point, though it has taken a considerable time to argue, in a great measure because the defendants thought that they ought to argue that there was no want of bona fides, which had never been suggested, and that their action was right in erasing this lady's name from the membership of the club, which is not a matter for us to decide at all. The only point that we have to decide is whether the meeting of the executive committee, at which the lady's name was erased from the membership of the club, was a properly constituted meeting of the executive committee.

There is no dispute whatever about the facts so far as they are necessary for our decision. The plaintiff was a member of a club called the Ladies' Imperial Club, and she made some remarks with regard to another lady who was a member of the club, which that lady, not unnaturally, resented. The plaintiff found that the remarks which she had made were unfounded, and withdrew them, and at first did not apologize, but, I understand, eventually apologized for making them. The matter was brought before the executive committee. There is another committee called the working committee, but that, I think, had nothing to do with this matter. The executive committee comes into existence under r. 26: "The Officers of the Club shall consist of a Secretary, appointed by the Board of Proprietors"—this is a proprietary club, and there are six gentlemen named who are the Board of Proprietors—"and a Committee of not more than 18 members of the Club of whom six are to be elected by the members at the annual general meeting and 12 by the Board of Proprietors." That executive committee is an important body, because it has the election of members by r. 9: "The election of

members shall be vested in the Executive Committee subject to confirmation by the Board of Proprietors." It also has the power of exclusion or expulsion by r. 42: "If the conduct of any member shall in the opinion of the Executive Committee be injurious to the character and interests of the Club the Committee shall have the power at once to expel such member from the use of the Club and to recommend her to resign. If such a member shall not resign within a month after notice of such recommendation has been given to her, the Committee shall erase her name from the list of members, and the person whose name is so erased shall cease to be a member of the Club: Provided that no member can be so suspended or recommended to resign unless a resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the Committee actually present at a meeting specially convened for that purpose."

I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting. It seems to me that is quite clearly laid down in *Smyth* v. *Darley* (1), where Lord Campbell says: "The election"—and you may read "expulsion" for "election"; exactly the same principle applies—"being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance—as, for instance, abroad—there could not be a good electoral assembly." And in the same way in *Portuguese Consolidated Copper Mines* (2) Lord Esher says this: "I will assume that every point taken by Mr. Rigby and Mr. Buckley ought to be decided in their favour except one. That one is this, that according to their own argument it is necessary that all the directors should have had notice of the meeting of the 24th." That was on general principles I think, and not any special provision in

(1) 2 H. L. C. 789, 803. (2) 42 Ch. D. 160, 167.

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB.

Lord Sterndale M.R.

the articles that notice should be sent to every member. "If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th." Therefore as to the general principle, I think, there can be no question. If the absent member of the body is at such a distance that it is physically impossible for him to attend in obedience to a summons, then the convener of the meeting is excused from sending the notice to that member, and without any such notice to him the meeting of the body will be properly convened. I incline to think, but I do not express any very definite opinion, that the same exception would probably be held good where it was undoubted that a member of the body was so dangerously ill that it was impossible for him to be moved, even although he might not be at a distance; and in *In re Portuguese Consolidated Copper Mines* (1), it is also, I think, decided that a person who ought to be summoned cannot dispense the convener of the meeting from summoning him by saying "I shall not be able to come; you need not summon me." There the director had gone to Ireland, and said he should be in Ireland. It was pointed out that Ireland is not inaccessible by post, nor is England inaccessible from Ireland if the director thought fit to come back from Ireland and attend the meeting. I do not know of any other exception.

The circumstances to which that principle has to be applied in this case are these. The executive committee consisted of fourteen members, including the chairman, the vice-chairman, and twelve other members, and one of those members was the Duchess of Abercorn. It is undoubted that the Duchess of Abercorn was not summoned; she had no notice sent to her of the meeting. It is equally undoubted that the Duchess of Abercorn was a member of the executive committee, and that has not been denied throughout the case. But the reason that was given for not summoning her was that she was really only a nominal member of the executive committee, and would not have attended if she had been summoned, and therefore it was unnecessary to send her notice. Even if it

(1) 42 Ch. D. 160.

were proved that she would not have attended I should be of opinion that that would not have excused the convener of the meeting from summoning her, but in my opinion nothing of the kind is proved. I think it is very likely that she would not have attended, but it is not proved that she would not, because the only evidence about the matter is the evidence of Lady Samuel, who was a member of the executive committee, and presided at some of the meetings. She was chairman, I think, of the executive committee. She said in her evidence: "Notices were not sent to the Duchess of Abercorn. Formerly she had taken great interest; later she said she had so many interests that she wanted to resign, but I asked her not to, and promised she should not be troubled." She then went on to express the opinion that there was not the slightest chance that the duchess would have attended if she had received the notice. That was her opinion. Therefore the position of the Duchess of Abercorn was this. She was a member of the executive committee, but she had said that she did not wish to be troubled; she had wished to resign, and she had been promised that if she continued her membership she should not be troubled. I asked the learned counsel what was the object of retaining her name, and his answer was, "It was an asset to the club to have her name on the executive committee"—that is to say, that persons seeing her name on the executive committee would, perhaps, have greater trust in the executive committee than they otherwise would have had. It is true she had not attended any of the meetings for some considerable time, no notices had been sent to her, but so far as I know no question of the expulsion of a member had previously arisen, the duchess had not been told of such a question having arisen since that conversation she had with Lady Samuel. I do not see any ground for saying that it is certain that if the duchess had had a notice saying that there was a specially convened meeting of the executive committee to consider the expulsion or the request to a member to resign she would not have attended; she might have done so, and she might not, but, at any rate, she was

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB.

Lord Sterndale M.R.

within summonable distance; she was not within the case that I have put of a person in such bad health that she could not attend; and the fact that when she consented to remain a member of the executive committee she was promised that she should not be troubled seems to me no ground whatever for omitting to summon her to a specially convened meeting of this description. She may easily have meant by that that she did not wish to be troubled with notices of the meetings and summonses to meetings to consider the ordinary routine business of the club, because the executive committee is the committee of management of the club. To my mind it is not shown that she would never have attended, but, whether she would or whether she would not, in my opinion there is no ground whatever for not giving her the opportunity, and therefore no excuse for not summoning her.

If that be so this meeting is bad. It was an invalid meeting, quite incapable of acting under r. 42.

It was argued that to hold this would be dangerous because it might interfere with the internal management of clubs. In my opinion it would be far more dangerous to hold otherwise, because that would be leaving it to the discretion of the secretary or some other person to omit to summon people, because the secretary or the chairman of the committee thought they would not attend. That, to my mind, would be very dangerous indeed. But I do not think it matters really one way or the other; it is a pure point of law, and, in my opinion, it ought to be decided in the appellant's favour. I regret to say I cannot agree with the learned judge's judgment on that point.

There is another point—namely, that the notice of the business to be transacted at the meeting was not sufficient. The notice was, "To report on and discuss the matters concerning Mrs. Young and Mrs. Lawrence," and therefore there is no reference to action under r. 42, and no reference to any possibility of a request to a member to resign, or the expulsion of a member.

I have looked at the minutes of the meeting and of the different meetings after this matter began to be discussed

for this reason, that it was said there was no necessity to tell any of the members of the executive committee what was going to be done, they all knew quite well. It certainly does not appear on the face of the document before us or on the evidence that they, all of them, did know. There are only seven members in all who attended any of these meetings, and they did not all attend each meeting; but taking all the members who attended all the meetings there are only seven out of the fourteen who attended the meetings at all, and there is nothing to show that the other seven, including the Duchess of Abercorn, who were not present at the meeting, were conversant with everything proposed to be done. I quite agree with what has been said to the effect that one ought not to examine this agenda and these notices of meetings too particularly and too meticulously; if in substance they convey to the members of the committee what is going to be done, that is sufficient, although one might have thought it might have been better done. My inclination is to say that this is not sufficient, but I do not think it is necessary to decide it, because the meeting was in my opinion incapable of acting on the other ground which I have stated. But I have no doubt of this, that the defendants would be well advised in summoning meetings of this kind to make their notices more particular, and to give better notice to the members summoned of the kind of business that is going to be transacted. I can see no difficulty in framing such a notice without hurting anybody's feelings.

It was said that the putting of the words "expulsion or suspension" upon the notices might be objectionable; I do not give an opinion upon that.

I only wish to say one word about another point which was taken, which, to my mind, was quite groundless—namely, that these defendants are not liable, that this action cannot be maintained, because under r. 41 of the rules the Board of Proprietors might have returned this lady her subscription and entrance fee, and prevented her from entering the club any longer. The short answer to that is: that is not what they did. The minute called upon her to resign, and in respect

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB.

Lord Sterndale M.R.

of her non-compliance with this minute her name was eventually erased. On the face of it, and so far as there is any evidence, the Board of Proprietors never deliberated, and there was no foundation for the suggestion.

The only question I have any doubt about is what ought to be done with the costs of the action. The learned judge has assessed the damages at one farthing, and, of course, we do not and cannot interfere with that. He has said nothing as to what he would have done with the costs of the action below if he had held the plaintiff entitled to recover. I think the appellant must have the costs of the appeal. What troubles me more is what ought to be done with the costs of the action. I cannot help thinking that if the learned judge had found in favour of the plaintiff he might have said it was a case where he did not think that she ought to have her costs. He has given us no indication of his opinion, and in these circumstances, as the action was brought really to try a matter of right, I do not think we ought to exercise our discretion by depriving the lady of her costs, although I confess I come to that conclusion with considerable doubt. Therefore I think, with some doubt, and perhaps with a little regret, that the lady should have her costs in the Court below.

WARRINGTON L.J. There is only one question we have to determine, that is to say whether the executive committee of the club, who for this purpose represent the defendants, acted properly in erasing the name of the plaintiff from the list of members of the club in accordance with the rule by which their conduct as a committee is governed.

The matter is, to my mind, not a mere technicality, especially as it involves the question whether or not the vexation, and perhaps something worse, should be imposed upon a member of having her name erased from the list. It seems to me of great importance that rules which have been made for the purpose of regulating the proceedings of the committee in respect of such a matter ought to be strictly adhered to. Now the rule in the present case provides: [His Lordship

read r. 42 and continued:] Pausing there for one moment, the first resolution virtually amounts to an expulsion of the member, because the member must have resigned in accordance with the resolution or refused to resign, and if she refuses to resign the subsequent material action of the committee is purely ministerial: they are directed then to erase the name of the member from the list of members of the club. The resolution of the executive committee is the one which recommends the member to resign.

Upon that there is attached the proviso which regulates the action of the committee in that matter: "Provided that no member can be so suspended or recommended to resign unless the resolution to that effect shall have been passed by a majority of at least two-thirds of the members of the committee actually present at a meeting specially convened for the purpose."

At the meeting at which the resolution in question was passed there were present five members of the committee. The members of the committee consisted of fourteen altogether. Among those members was the Duchess of Abercorn. To all the members of the committee notices were sent excepting the Duchess of Abercorn. Therefore one member of the committee did not have notice, and was not summoned to this, which was to be a meeting specially convened. There is a second point which deals with the business which it was intended to transact at that meeting. It is to be observed that the rule provides that the meeting shall be specially convened for the purpose. The purpose is to consider the question whether or not a member shall be suspended or recommended to resign. The only notice that was given in the present case on the agenda was that the meeting was to report on and discuss the matters concerning the present plaintiff and the other lady as to whom the trouble had arisen.

I will deal with that point first. To my mind that notice was not a sufficient notice. The meeting convened in accordance with it was not "a meeting specially convened" for the purpose of considering the particular thing—namely, whether or not Mrs. Young should be recommended to resign.

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB

Warrington L.J.

However, I pass from that for the moment, and I come to what is certainly the more important defect in the proceedings of the committee—namely, the omission to summon the Duchess of Abercorn, who was one of their number.

In *Smyth* v. *Darley* (1) Lord Campbell says this: [His Lordship read the passage quoted above by Lord Sterndale and continued:] If, therefore, the default in summoning the Duchess of Abercorn was not justified, then the meeting of the committee was not a good meeting for the purpose of transacting any business at all on behalf of the club. In *Smyth* v. *Darley* (1) the provisions of the Act of Parliament were not unlike the provisions of the rule in the present case. It concerned in that case the election of an officer of the City of Dublin, and it was provided that when a vacancy occurred "the Lord Mayor shall convene the Board of Magistrates for the City of Dublin to a meeting," and so on, and then the meeting, by the majority of the votes of such magistrates as should be present, should proceed to elect the person. It was held in that case that the omission to summon one of the magistrates was a fatal defect in the constitution of the assembly who proceeded to elect the officer in question. So here the default in summoning one member of the committee in my opinion rendered the committee incompetent at this meeting to deal with the business which was before it.

But it is said that there was a reason for not summoning the Duchess of Abercorn. To my mind the reason given is wholly insufficient. The reason given is that she had consented to be nominally a member of the committee, but that she was not to be troubled—I suppose by having to attend. That may well be, but it does not at all follow that she was not to have an opportunity of attending if she wished to attend. It is no great trouble to receive a letter giving notice of the meeting, and there is not a word to show that she even desired not to have the notice; but if she had it would have had no effect, because under these circumstances it is not the right of the member of the committee which is the question; it is the right of the person with whom the

(1) 2 H. L. C. 789.

committee is going to deal, and the members of the committee had no power to waive the giving of the notice. That point was decided in the case of the *Portuguese Consolidated Copper Mines.* (1)

In my opinion, therefore, for the two reasons I have stated, this committee was not a proper committee within r. 42. The action, therefore, was effective, the appeal succeeds, and I think the plaintiff was entitled to succeed, and in the result I agree with what has been said by the Master of the Rolls.

SCRUTTON L.J. As we are differing with the learned judge below I express my opinion in my own words. Mrs. Young brings her action for damages, which the learned judge below has assessed at a farthing, because her name has been wrongly removed from the list of the members of the club.

In view of the very common practice of including rules by which the committee may expel members in the rules of clubs, I think it is desirable that it should be clearly understood that this Court is not a Court of Appeal from the decisions of committees of clubs, provided the committees are properly constituted and properly summoned, and deal with the matter in a way not contrary to the principles of natural justice.

And I say that because counsel for the plaintiff has said that she has brought this action to clear her character. We know nothing about the lady's character, and have no intention to clear or to express any opinion about it. All we know is, that she has made a charge against a fellow member which turns out to be groundless. Except for that we know nothing about the lady, or whether her character is clear or not. The only point that comes before us is, Was the committee properly constituted, properly summoned, and is there anything contrary to the principles of natural justice in the proceedings ?

It is said that the committee was not properly constituted, because one of the members of the committee, the Duchess of Abercorn, was not summoned to the meeting which passed the resolution recommending Mrs. Young to resign. It is

(1) 42 Ch. D. 160.

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB.

Scrutton L.J.

said, on the other hand, that there was no need to summon the Duchess of Abercorn, because when she had consented to her name appearing on the committee the chairman, Lady Samuel, had told her that she would not be troubled. In my view that is quite an insufficient reason for not summoning her.

Every member of the committee ought, in my view, to be summoned to every meeting of the committee except in a case where summoning can have no possible result, as where the member is at such a distance that the summons cannot effectively reach the member in time to allow him or her to communicate with the committee. Extreme illness may be another ground, though I should myself require the illness to be extremely serious, because a member of the committee receiving a notice to attend may either write to ask for an adjournment of the meeting or express his views in writing to the committee, and I should require the illness to be such as to prevent that form of action being taken on receiving notice of such a meeting. But that a member of the committee, whose name is put forward as a member of the committee, should not be summoned, because she has stipulated that she shall not be troubled, appears to me to be a quite insufficient reason. I think, therefore, that the lady is entitled to succeed on this appeal. I share the Master of the Rolls' view as to costs, because although I do not think that the lady is taking very much by this action—she certainly is not clearing her character if that is what she thinks she is doing—yet the learned judge below has not expressed any opinion as to what he would have done if he had given the farthing damages which he fixed. It is of importance, it appears to me, that a club committee should understand that they must act regularly in expelling members, and, consequently, I do not feel able to say, as a judge of first instance, that a farthing damages shows that the action should not have been brought, because I think there is some public importance in making clear to club committees that they must act regularly in the expulsion of members; and it follows, therefore, that in my view the costs here and in the Court below should be

given to Mrs Young, though, as I have said, I am inclined to share my brother's regret that that consequence follows.

C. A. 1920

YOUNG v. LADIES' IMPERIAL CLUB.

Scrutton L.J.

Appeal allowed.

Solicitors for the appellant: *Wingfield & Blow.*
Solicitors for the respondents: *Kirby, Millett & Ayscough.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A. 1920

Mar. 3, 4, 18.

PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES *v.* MUMFORD.

Insurance—Lloyds' Banks' and Trust Companies' Policy—Construction.

The plaintiffs carried on the business of acting as custodians of securities deposited with them by customers for safe keeping. They were insured under a policy underwritten by the defendant for a period of twelve months from September 30, 1916, against all losses which they might, during the twelve months, discover that they had sustained at any time since September, 1909:—

1. "By reason of any bonds, debentures, scrip, certificates, warrants . . . . or other similar securities . . . . the custody of which they have undertaken, and which now are or are by them supposed or believed to be . . . . in or upon their premises . . . . being while so in or upon such premises . . . . made away with by . . . . theft . . . . embezzlement, burglary or abstraction . . . . whether by the officers, clerks and servants of the assured or any other person."
2. "By reason of any securities of the description above specified being . . . . stolen, misappropriated or made away with by . . . . fraud of their officers, clerks or servants . . . . whilst in transit . . . . between any houses or places within 100 miles from Philadelphia" where their business premises were situate.

In May, 1917, during the currency of the policy, the plaintiffs discovered that W., one of their servants, had, between September, 1909, and September 23, 1916, fraudulently made away with large quantities of securities deposited with them by customers. Securities deposited with the plaintiffs were kept in strong rooms or "vaults" in the custody of a vault clerk. Customers desiring to withdraw securities frequently

C. A.

1920

PENNSYLVANIA COMPANY v. MUMFORD.

went to the plaintiffs' premises themselves, or sent a person on their behalf, and the securities were taken from the vault to the customers' reception room and handed over to them there. W. obtained possession of the securities in question from the vault clerk by fraudulently pretending that he was authorized to receive them on behalf of their owners, and having forged the owners' receipts for them and delivered those receipts to the plaintiffs, he misappropriated the securities to his own use. There was no evidence that the vault clerk when handing the securities to W. did not suppose that they were to be taken and delivered to the owners in the reception room :—

Held (1.), that in the sentence in clause 1 of the policy "by them supposed or believed to be," the words "by them" governed "believed" as well as "supposed"; that it was not sufficient, to bring a loss within that clause, that the securities were believed by the customers to be on the premises at the date of the policy; and that consequently, as the plaintiffs knew that the securities had been withdrawn before that date, clause 1 did not apply.

(2.) That a "transit" between the vault and the customers' reception room was not a "transit between any houses or places" within the meaning of clause 2; a transit which was intramural only was not covered; and that the defendant was not liable on the policy.

Decision of Roche J. (1) affirmed.

APPEAL from the decision of Roche J. (1) in an action brought by the plaintiff company upon a Lloyds' policy of insurance, dated September 30, 1916, and underwritten by the defendant, whereby the several underwriters agreed, in the proportion which the sums underwritten by them bore to 20,000*l.*, to make good to the plaintiffs "all such direct losses as they . . . . may during the space of twelve calendar months from noon of the 30th day of September, 1916, to noon of the 30th day of September, 1917, discover that they have sustained" in manner thereinafter mentioned.

The terms of the policy and the facts of the case are fully stated in the report in the Court below. (1)

Roche J. held that the defendant was not liable on the policy, and the plaintiffs appealed.

There was no appeal from the decision upon the counter-claim.

R. A. Wright K.C. and *Stuart Bevan K.C.* for the appellants.

MacKinnon K.C. and *J. G. Archibald* for the respondent.

(1) [1920] 1 K. B. 314.

The arguments addressed to Roche J. were repeated, and sufficiently appear from the following judgments of the Court of Appeal.

Cur. adv. vult.

March 18. LORD STERNDALE M.R. This appeal arises out of a claim by the plaintiffs upon a policy of insurance underwritten by the defendant as one of a number of Lloyds' underwriters.

It formed one of a series of annual policies beginning in 1909, and was against all direct losses of the kind included in the policy which the plaintiffs might discover during the twelve months covered by the policy, provided such losses had occurred during the currency of the previous policies of the series.

The facts are most carefully and accurately stated in the judgment of Roche J., and I do not propose to repeat them except so far as may be necessary to make the judgment intelligible.

The circumstances in which the claim arose are as follows. The plaintiffs had in their employment a trusted official called Williamson, who in the latter part of his service was secretary of the company. He took advantage of his position to misappropriate a number of securities belonging to four ladies, who were customers of the plaintiffs, to the aggregate value of over 140,000*l.* These misappropriations took place on forty-one different occasions, extending over a series of years during the currency of the series of policies concerned in this case. In order to conceal his thefts Williamson was obliged to pay the interest to the customers, and for that purpose he kept a list of the securities. He was dismissed for some reason unconnected with these matters in October, 1916, and in May, 1917, it was discovered that a customer's securities were missing. Williamson was sent for, and asked about the matter, and he admitted that he had stolen the missing securities and others, and produced a list showing in all forty-one thefts, beginning in March, 1914, and ending in September, 1916. The method of the thefts is set out

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Lord Sterndale M.R.

in the report. (1) Shortly, it was that Williamson obtained an order on the vault clerk to give him the securities, called a withdrawal card, signed by the official authorized to give such orders. There was no evidence as to the statements made by him on which he obtained the cards. Probably he told the official that the customer required the return of the securities, or it is possible that, by reason of his trusted position, it was not necessary for him to do more than ask for the card, on which the official would presume that the securities were required for a customer. Having obtained the card, Williamson presented it to the vault clerk, who delivered the securities to him, and Williamson at once appropriated them to his own use. He then produced documents, which he forged when necessary, to show that the securities had been delivered to the customer, and entries were made in the books showing that they had left the company's custody. None of the securities, therefore, were believed or supposed by the company to be upon their premises or that of any of their agencies when this policy began. The plaintiffs' claim was founded on two clauses in the policy—i.e., those numbered 1 and 2. Very little stress was laid on clause 1, which is in these terms. [The Master of the Rolls read the clause, and continued :] It is not, I think, arguable that the loss falls within this clause. In order to do so the securities stolen must have been believed or supposed to have been on the plaintiffs' premises between September 30, 1916, and September 30, 1917, and as I have shown they were not, and were not supposed or believed to have been there, but were supposed or believed to have been returned to their owners before September 30, 1916. The appellants insisted much more strongly on their claim under clause 2. [His Lordship read it, and continued :] They contended that the securities were in transit as soon as they left the vault, and were delivered to Williamson, and that they were in transit from that time, although they might not be intended to leave the premises, but to be delivered, as they commonly were, to the customer in a room within the building. In

(1) [1920] 1 K. B. 314.

other words, it was contended that to take the securities from one room to another within the building was to put them in transit within the meaning of clause 2. The nature of the premises is thus described in the report. (1) [His Lordship read the passage, and continued:] I think this contention of the plaintiffs is wrong. The governing words as to transit are that it must be between houses or places, and I think places must be read to mean some distinct premises in the sense that houses are distinct from one another, and that the word was probably put in to cover such places as the recognized places of safe deposit mentioned in clause 1. To move securities from one room to another in the same building seems to me to put them in transit if at all from one part to another part of the same place, and not from one place to another. This is strengthened, I think, by a comparison of clauses 1 and 2, of which the former appears to deal with the securities on the plaintiffs' premises and the latter with them in transit to or from such premises, though the transit from them is made by the last words of the clause to begin before the securities have actually left the premises.

If this be right, then in order to come within the clause the securities must have been in transit to some place outside the plaintiffs' premises. I see no evidence at all that they were. In fact they never were in transit at all except from the vault clerk's hand to that of the thief, who immediately appropriated them; but I will assume that if the official, when he signed the withdrawal card, meant to start them on a transit outside the premises the clause would be satisfied. I do not, however, decide that it would. But on this assumption there is no evidence that these securities were not to be delivered within the premises. It was shown that the customers to whom they belonged commonly called or sent for securities which they wanted, and there is nothing whatever to show that the official when he signed the card had any information that led him to suppose that these particular securities were to be sent outside the premises rather than handed over in the waiting-room to which

(1) [1920] 1 K. B. 317.

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Lord Sterndale M.R.

customers went. I think these securities were not in transit between any houses or places when they were stolen.

It was also contended by the defendant that the plaintiffs failed to bring the case within the clause on another ground—i.e., that the definition "securities of this description" in clause 2 introduced into the clause all the words in clause 1 down to the word "being," and that therefore securities in transit were only within the policy if they had been, or were supposed or believed to have been, on the premises during the twelve months mentioned in the policy.

In the view I have taken of the clause it is not necessary to decide this point, and I express no opinion on it.

A further and important question arises as to the amount of liability in case the plaintiffs had established their claim. This is not material if the defendants are, as I think, not liable at all, but as it was strenuously argued before us, I think I should express my opinion on it.

It arises upon the following proviso: "Provided that the total liability of each of the undersigned in respect of any one loss under this guarantee is limited to the amount underwritten by him irrespective of the total value of the securities comprised in such loss and that in estimating the amount of such securities so lost as aforesaid the value of the same shall be taken at the average market price or value in Philadelphia or New York on the day of the discovery of such loss or losses respectively . . . . and if there be no market-price or value of the same or any of them on such day then the value thereof shall be the value as agreed between the respective parties or in the event of difference as ascertained by arbitration. And further that upon any loss happening under this insurance (and subject to the due payment thereof) a further premium calculated at pro rata of the annual premium for the unexpired time on the amount of such loss shall be payable by the assured to the undersigned, and that as from the time of the happening or discovery of such loss, and even although the further premium may not meanwhile have been actually paid, this insurance shall be treated as renewed so as at all times during the said period

of twelve calendar months to continue as an insurance to the full extent of 20,000*l.* notwithstanding any previous loss which the undersigned may have paid or be liable to pay hereunder the true intent and meaning of these presents being that while the total liability of each of the undersigned in respect of any single loss is to be limited to the amount underwritten by him any number of separate claims to that amount may either on the same or on different days arise against him hereunder subject only to his right on the happening of any loss to payment of the further premiums hereinbefore mentioned and provided for." The contention of the defendant is that any one loss in the beginning of this proviso means any one discovery of losses which gives rise to a claim. I do not agree with this. I think the words I have quoted from the beginning of the policy, "All such direct losses as the company may discover," point to a distinction between loss and discovery, and in the proviso itself I find the expression "discovery of such loss or losses," which points in the same way. I think the limitation is to an amount for each loss, and that it is immaterial whether the losses are discovered at one or at different times during the currency of the same policy.

There were several items of the claim arising from the theft of certain securities which Williamson had been instructed to buy for customers, and which he had stolen before they reached the plaintiffs' premises. These were said to stand on a different footing from the other items, but I do not think it necessary to consider them for this reason. The defendants before this action, not appreciating that they had a defence—except as to amount—paid to the plaintiffs 20,000*l.*, and Roche J. has decided that they cannot recover it back. Against this part of his judgment there is no appeal, and therefore the plaintiffs retain a sum of money far more than sufficient to satisfy their claim as to these items. I think the appeal should be dismissed with costs.

WARRINGTON L.J. This is an appeal by the plaintiffs from a judgment of Roche J. dismissing their action. The

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Warrington L.J.

action was on a policy of insurance against loss by theft. The defence was twofold: (1.) That the loss in question was not covered by the policy. (2.) That if it was, the liability of the underwriters was limited to 20,000*l.*, and this sum they had paid. The decision on both heads turns on the true construction of the policy. Roche J. has decided in the defendant's favour on the first head. On the second he has expressed an opinion in favour of the plaintiffs.

The plaintiffs are an American company carrying on business in Philadelphia amongst other places. At their office in Philadelphia part of their business is to receive securities from their customers for safe deposit, and to collect dividends and interest thereon.

Between September, 1909, and October, 1916, one Williamson was a trusted servant of the plaintiffs at their office in Philadelphia, and from 1913 he was their secretary. In accordance with the practice of the company certain customers were specially allocated to Williamson, and amongst them four ladies.

Between September, 1909, and September 23, 1916, Williamson fraudulently obtained possession of and disposed for his own purposes of securities of these ladies of the value of upwards of 140,000*l.*

In accordance with the ordinary routine of the company he obtained from the proper officer his signature to withdrawal cards on a false statement that the customers desired to withdraw their securities. Armed with these cards he obtained the securities from the clerk in charge of the vault where they were deposited. He subsequently produced receipts forged by him but purporting to acknowledge the receipt of the securities by the customers, and regular entries of the withdrawal were made in the company's books. The officials of the company, therefore, were led to believe that the securities were no longer deposited with them. These transactions all took place before September 30, 1916.

As to seven items the procedure was different. These were securities purchased for the customer with moneys standing to her credit with the company in respect of

dividends and interest collected for her. They were obtained by Williamson from the brokers, were made away with by him, and never came into the custody of the company at all, though they were delivered by the brokers to Williamson or his messenger for the purpose of being deposited with them. These fraudulent transactions of Williamson all took place before September 30, 1916, but the loss was not discovered till May, 1917, when, on being asked for an explanation as to the securities of one customer, he made a clean breast of it, and confessed to the whole series of thefts and forgeries. There were in all forty-one separate cases. The plaintiff company having made good the losses to their customers claimed against the underwriters under the policy. They, apparently not appreciating that they might successfully contend that the losses were not covered by the policy, paid 20,000*l.*, being, as they considered, the limit of their liability. The company then claimed the balance of the 140,000*l.* This the underwriters refused to pay; this action was then brought, and the defences above mentioned were raised.

The policy is a Lloyd's policy, and is dated September 30, 1916. The underwriters thereby agreed in the proportions which the sum underwritten by them bore to 20,000*l.*, to make good to the plaintiffs "all such direct losses as they may during the space of twelve calendar months from noon of the 30th day of September, 1916, to noon of the 30th day of September, 1917, discover that they have sustained in manner hereinafter mentioned, that is to say." [His Lordship read clauses 1 and 2 of the policy and the proviso thereto, and continued:] It was not seriously contended before us that the losses in question came within the first clause; the securities could not be supposed or believed by the company to be in their custody at the date of the policy, their books showing that they had been withdrawn before that date. The fight has ranged round the second clause.

The defendant contended, first, that the whole of clause 1 down to and including the words immediately preceding "being .... lost" form part of the description of the securities covered

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Warrington L.J.

by clause 2, and that the securities in question not being within clause 1 were not within clause 2 either.

I agree with Roche J. that this contention fails. I think the word "description" is appropriately used to connote the quality of the thing referred to, and not appropriate to indicate external conditions applicable to it. Moreover, to give effect to the defendant's contention in this respect would be to exclude from clause 2 securities entrusted to a servant of the company for conveyance to them for the purpose of deposit, a result which I hardly think can have been intended.

But the defendant raises what to my mind is a much more serious contention. He says the underwriters are responsible for securities only whilst in transit between houses or places, and, as regards all the cases except the seven special cases above referred to, there was no evidence of the securities ever having been in transit except within the company's premises themselves, and such a transit is not, within the meaning of the clause, "transit between houses or places." I think this contention is well founded. It seems to me that loss while on the company's premises, whether the securities are in the accustomed place of deposit or are being carried from one part of the premises to another, is contemplated by clause 1, and that the transit in clause 2 is intended to cover a loss not covered by clause 1.

There was in fact no evidence of any transit except from the actual place of deposit to Williamson's possession, nor was there any evidence that any part of such transit was outside the plaintiffs' premises. There was not any evidence that even if the withdrawal had been a genuine withdrawal there would have been any transit except from the vault to the customer in the waiting-room. I agree with the learned judge that there was no evidence of the securities being at the time of loss in transit within the meaning of clause 2, and therefore the appeal on this point fails. As to the special items, I think there was evidence that they were in transit from the purchasing brokers' office to the company's safe deposit, but this makes in this case no difference

to the result, inasmuch as the loss in this respect is more than covered by the 20,000*l.* already paid. The learned judge has said, on the construction of the proviso, that if it were necessary so to decide he would be prepared to hold that the liability is not limited to the 20,000*l.* I agree with him on this point. I think there were in fact forty-one different losses, though they were discovered on the same day. The proviso seems to me to work this out by providing that a payment for one loss shall not even pro tanto extinguish the liability of the underwriter, provided a premium is paid calculated as to amount by the proportion the amount of the loss bears to 20,000*l.*, and as to period by the proportion the unexpired period bears to twelve months, and that, subject to such premium being paid, the amount of any number of losses may be discovered on the same day. This last point makes no difference to the result, which is that, the losses in question not being covered by the policy, the learned judge was right in dismissing the action, and this appeal must also be dismissed.

SCRUTTON L.J. I do not repeat the facts of this case as stated by Roche J. It is enough to say that the claim is by a trust company against underwriters on a common form of Lloyds' policy for loss, by fraud of the company's servants, of securities entrusted to them by customers, and that the nature of the fraud is not that the securities were fraudulently abstracted by the servant, while the company thought the goods remained on their premises, but that the servant by fraud and forgery induced the company to think that the goods were asked for by and delivered to the customer, and so left their possession, when in fact the servant never had a request from the customer for the securities, nor delivered them to the customer. The scheme of the policy is that it is one of a series of consecutive policies, liability on which is fixed primarily by the year in which the loss is discovered, not by the year in which it happened.

There are two heads of loss insured, the first (clause 1) relating to loss while the securities are stationary, or in

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Scrutton L.J.

custody; the second (clause 2) relating to loss while the securities are in transit. It was hardly argued that there was a valid claim under clause 1, for that clause was confined to the loss of securities which either were or were believed by the company to be in their custody at the date of the policy, or were in such custody during the twelve months of the policy. These words are applicable to the case of surreptitious abstraction before the date of the policy from the company of securities which they still believe to remain in their possession, but are not applicable to cases where the company, before the date of the policy, are induced to part with the securities in the belief induced by the fraud of their servant that they are delivering them to the customer. Such securities are at the date of the policy neither in the custody of the company, nor supposed or believed by the company to be in their custody. I pass therefore from clause 1, which is only of this further importance, that its inadequacy for the facts of this case makes it clear that the policy had not been carefully framed to cover all probable cases of loss of securities. The meaning of clause 2, the clause covering loss whilst in transit, is more doubtful. It begins: "By reason of any securities of the description above specified." It is argued for the underwriters that these words incorporate in clause 2 all the limitations of "bonds and, or similar securities" contained in clause 1 before the next material phrase "being lost," so as to include the limitation to securities which now are, or are supposed or believed to be, on their premises. It is argued for the company that "description" did not include these words, although they did define or determine the securities which were included in the protection of the first clause. Asked where, in clause 1, the "description" ended, counsel for the company were in a difficulty. They were at first inclined to say at the word "undertaken," for it was obvious that some such limitation as to interest or custody was necessary in clause 2. Finally, to say this, however, rendered it difficult for them to cut out of the "description" the words which followed beginning "and which," so they elected to say that the description

stopped at "landed property," and that the limitation of interest or custody was implied in clause 2, not incorporated expressly by the word "description." I have come to the conclusion that the words "description above specified" incorporate all the words which determine or define the subject-matter exposed to loss, and therefore incorporate the limitation to securities on the premises, or believed or supposed to be there. To illustrate, if clause 1 were on "cattle sheep or other animals on my Sussex farm for at least twelve months before the date of the policy," the "description above specified" would in my opinion include the time and place definition as well as the enumeration of the animals. The point does not admit of prolonged reasoning; to the best of my judgment that is the meaning. It is true this reading excludes some matters from clause 2 which one might expect to have been covered, though not such important matters as those which it is clear are excluded from the first clause. It is true that if the securities first came from the customer in transit by the hands of officers of the company (an unusual course I should think) they will not be covered till they reach the company's premises, or are believed by the company to have reached them. So also loss in transit before the commencement of the policy will not be covered, though discovered during the currency of the policy, unless the securities in fact lost were believed by the company to be on their premises at the date of the policy. But a policy which allowed the larger gap in the first clause may easily, by defective expression, leave those smaller gaps in the second clause. Mr. Justice Roche thought that "description" did not cover local position. I cannot agree; it seems to me it can easily cover both enumeration of securities and definition or limitation of them to those possessing certain attributes relating to time or space. This point is enough to support the judgment below, and dispose of all claims by the company. But the judge below decided in the underwriters' favour on another ground, to which I now turn.

Did the loss occur on a transit? Of the actual facts we

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Scrutton L.J

know very little. To get the securities from the vault in which they were deposited the thief must have obtained a withdrawal card from a high officer of the company. If he was asked at all why he wanted a withdrawal card he probably said that the customer wanted to withdraw the securities; but there is no actual evidence as to whether he was asked anything, or what he said if he was asked. All the customers whose securities were stolen were ladies. There is evidence that two of them as a rule called at the company's office when they had business. Of the other two, one "does not come much, if at all. We generally send to her or she sent a maid sometimes." The other "much the same, or a son would come." It is quite consistent with the facts that the thief represented that the customer had called or was going to call for her securities, and that he would take the securities from the safe and deliver them to the customer on the company's premises. But there is no evidence as to what actually happened, or even was supposed by the company to be happening. All that is known is that the thief got the securities out of the safe by a withdrawal card, as to which it is not known by what representations, if any, he got it, and misappropriated them in some way and place unknown, but probably as soon as he got them out of the safe. The material words defining the transit insured are "whilst in transit . . . . in the hands of their officers clerks or servants or any messengers between any houses or places situate within 100 miles from P. . . . . such risk or transit to commence on every security or parcel of securities from the moment of the person into whose hands the same may be delivered on behalf of the assured receiving the same and to continue until the delivery thereof at destination."

But for the latter words of this clause I should think that operations within the company's offices were not a transit; in my opinion, however, the latter words show that if there is a transit "between houses or places" it may begin in the first house and end in the second. It is, however, a considerable step further to say that an operation both beginning and ending in the first "house" is a transit between houses

or places. Examples of this would be taking the securities from the safe to another room in the office for the auditors to examine them and returning them to the safe, or taking them from the safe to give to a customer in the waiting-room in the company's office. Neither of these, in my view, would be a transit between "houses or places." I can understand that where an official takes securities from the safe in Philadelphia ostensibly to deliver them to a customer in Boston, there is a "transit" from Philadelphia to Boston, and it begins when the official takes them from the safe—but there is in that case a transit between "houses or places." In the cases above put there is no "transit between houses or places," and the plaintiff company is, in my opinion, in this further difficulty—that they must give evidence of a transit in which the goods were lost, and they prove nothing as to the actual or intended transit. It is quite consistent with the evidence that the thief said he wanted the securities to deliver to a customer in the waiting-room; it is quite possible he said nothing except to ask for a signature, but was trusted. Of what transit was intended there appears to me to be no evidence; no evidence also of what transit, if any, commenced. The thief walked away with the securities in his hand or his pocket. These reasons, which I have stated in my own words, lead me to concur in the result of Mr. Justice Roche's judgment on this point.

A third point arises in a curious way. My previous views render it unnecessary to decide it, but as the underwriters argued it strenuously, and obviously attached great importance to it, I express my opinion on it. For with great respect to the eminent authorities at Lloyds' who are responsible for this common form policy, if it means what their counsel contend it means, the sooner it is put into language intelligible to ordinary assured the better, and the occasion of this revision might be made the opportunity for recasting it so as to cover the losses which occurred in this case, which clearly should be within the scope of such a common form policy. The policy is on all such direct losses as the assured may discover during the currency of the policy, and which have

C. A. 1920

PENNSYLVANIA COMPANY v. MUMFORD.

Scrutton L.J.

happened since the first policy was taken out seven years before. It is for 20,000*l.*; and there is a provision that on the occurrence of a loss and payment, the amount insured may be again raised to the original figure by payment of a fresh premium; "the true intent and meaning of these presents being that while the total liability of each of the undersigned in respect of any single loss is to be limited to the amount underwritten by him any number of separate claims to that amount may either on the same or on different days arise against him hereunder subject only to his right on the happening of any loss to payment of the further premiums hereinbefore mentioned and provided for." That is to say, supposing a theft of 20,000*l.* has taken place on January 1 in each of the seven years commencing January 1, 1910, and these seven thefts are discovered on seven consecutive days in October, 1916, there will be a claim for seven times 20,000*l.*, on the appropriate premiums being paid. I understand the counsel for the underwriters to admit this, but to contend that if the seven thefts were all discovered at the same time, there would only be a claim for one loss of 20,000*l.* Their reason for this was that it was the discovery, not the theft, that made the loss, and there was only one discovery. This, in my view, is quite erroneous. The policy is against direct losses, discovered during the year; "any one loss" refers to the loss, not to the discovery. "Separate claims for any single loss" may arise on the same day, and by the same discovery of the various single losses. I was quite unable to understand, or see any ground for the argument of the underwriters to the contrary, or any difficulty in calculation of the premiums to be paid for several losses above the 20,000*l.* limit all discovered at the same time. Originally this was the only point fought by the underwriters, who paid one loss of 20,000*l.* When this was not accepted in settlement they raised the other points which I have held good in answer to the claim, but they have paid 20,000*l.* This fact renders it unnecessary to consider some special cases amounting in all to 14,000 dollars only, which were said not to come within the general points already decided; for

if the underwriters are liable for them they have paid a much larger sum.

For these reasons I think the result of the judgment of Roche J. should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Paines, Blyth & Huxtable.*

Solicitors for respondent: *Parker, Garrett & Co.*

G. A. S.

[IN THE COURT OF APPEAL.]

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* ALEXANDER VON GLEHN & COMPANY, LIMITED, RESPONDENTS.

Revenue—Income Tax—Excess Profits Duty—Deductions—Penalty—"Loss connected with or arising out of" Trade or Business—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched.* (*D*), *Case* 1, *Rule* 3.

The appellants, who were general produce merchants, were sued for penalties on informations exhibited by the Attorney-General under the Customs Consolidation Act, 1876, s. 139, as extended by the Customs (War Powers) Act, 1915, s. 5, sub-s. 1, for breaches of the orders and proclamations relating to the requirements of the Board of Customs and Excise with respect to certain consignments of goods. The actions were settled by consent on an agreement by the appellants to pay a penalty of 3000*l.* without costs upon terms that the record was withdrawn. The appellants incurred legal costs to the amount of 1074*l.* 12*s.* 9*d.* in connection with these proceedings. They claimed that these sums of 3000*l.* and 1074*l.* 12*s.* 7*d.* were proper deductions in arriving at profits for the purposes of excess profits duty. The special commissioners found that the penalty or loss of 3000*l.* and costs was incurred by the appellants in the course of carrying on their trade, and was incidental thereto, and decided that the deductions were admissible. On appeal to the Revenue judge this decision was reversed. On appeal:—

Held, that penalty or loss of 3000*l.* and costs was not a "loss connected with or arising out of" the trade or business within the meaning of s. 100, Sched. (D), Case 1, Rule 3, of the Income Tax Act, 1842, and was therefore not a proper deduction in arriving at the profits of the respondents' trade or business for the purpose of excess profits duty

C. A.

1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

(which was calculated upon the same principle as income tax subject to certain modifications contained in s. 49, sub-s. 1, of the Finance (No. 2) Act, 1915, not material to the present case). To be within the section the loss must be something within commercial contemplation and in the nature of a commercial loss.

Inland Revenue Commissioners v. *Warnes & Co.* [1919] 2 K. B. 444 approved.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on a case stated under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59, and the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 45, sub-s. 5, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on May 25, 1917, the respondents, Alexander von Glehn & Co., Ld., appealed against an assessment to excess profits duty amounting to the sum of 3784*l.* (afterwards adjusted to 3574*l.*) for the accounting period of one year ending December 31, 1915, made on them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments.

The respondents were general produce merchants, and carried on business in the City of London. The business was an old-established one, and was founded in or about the year 1835 by Robert von Glehn, a Russian subject from Reval, who became a naturalized British subject, and married a Scottish lady. The directors and secretary of the respondent company were all natural-born British subjects.

A large part of the respondents' trade consisted of the export of goods to Russia and Scandinavia. After the passing of the Customs (War Powers) Act, 1915, the respondents adopted several additional precautions in the course of such trade in order to prevent an infringement of the provisions of the Act and the amendments thereof. The profits of the trade had been included in the assessment appealed against after deduction of the costs of so carrying it on.

Notwithstanding the precautions taken by them the respondents were in the year 1916 sued for penalties in the King's Bench Division on informations exhibited by the

Attorney-General under the provisions of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 139, extended by the Customs (War Powers) Act, 1915, sub. s. 1 (1), in respect of alleged infringements of the said Acts by them in the course of their trade, and upon the proceedings coming on for hearing before the Lord Chief Justice the respondents agreed to pay and did pay a sum of 3000*l.* without costs upon terms of the record being withdrawn. The respondents incurred legal costs to the amount of 1074*l.* 12*s.* 7*d.* in connection with these proceedings. A copy of the informations and plea and a shorthand note of the proceedings in the High Court were attached to and formed part of the case.

The only question that arose on the appeal was whether the said sums of 3000*l.* and 1074*l.* 12*s.* 7*d.* were proper deductions in arriving at profits for the purpose of excess profits duty.

The respondents contended that the sums were such proper deductions, while the appellants (the Commissioners of Inland Revenue) contended to the contrary.

The Special Commissioners found that the fine or loss of 3000*l.* and costs was incurred by the respondents in the course of carrying on their trade, and was incidental thereto, and decided that the deductions were admissible, and reduced the adjusted assessment to 1129*l.* 4*s.* The Crown appealed.

Rowlatt J., following his own decision in *Inland Revenue*

(1) Customs (War Powers) Act, 1915 (5 Geo. 5, c. 31), s. 5, sub-s. 1: "Where in pursuance of any order made by the Commissioners of Customs and Excise under s. 139 of the Customs Consolidation Act, 1876, a person in the course of making entry before shipment makes a declaration as to the ultimate destination of any goods then . . . . the exporter shall, if so required by the Commissioners of Customs and Excise, produce evidence to their satisfaction that those goods have not reached a destination in any territory which, under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, is or is treated as enemy country, and if he fails to do so he shall be liable to a penalty of treble the value of the goods or 100*l.* at the election of the Commissioners, unless he proves that they reached such destination without his consent or connivance, and that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration."

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

Commissioners v. *Warnes & Co.* (1), held that fine or loss of 3000*l.* and costs was not a "loss connected with or arising out of" the trade or business within the meaning of s. 100, Sched. (D), Case 1, Rule 3, of the Income Tax Act, 1842, and was therefore not a proper deduction in arriving at the profits of the respondents' trade or business for the purposes of excess profits duty.

The respondents appealed.

Rigby Swift K.C. and *A. M. Latter* for the appellants. This is really an appeal from the decision of Rowlatt J. in *Inland Revenue Commissioners* v. *Warnes & Co.* (1) The question is whether a trader who in carrying on his business incurs a penalty for breach of a statutory order or proclamation is entitled to treat it as a loss which may be deducted in arriving at his assessment to excess profits duty.

The appellants in carrying on business with Russia failed to put themselves in a position to establish that goods consigned by them had not gone to an enemy country, and thereby they sustained a "loss connected with or arising out of" their trade or business within the meaning of s. 100, Sched. (D), Case 1, Rule 3, of the Income Tax Act, 1842: *Partridge* v. *Mallandaine.* (2)

Sect. 5 of the Customs (War Powers) Act, 1915, does not apply except where a declaration is made. The appellants need not have made a declaration. If they had not done so they could not have been convicted under the section. The appellants made the declaration solely in connection with their business. The Commissioners have found as a fact that this loss was incidental to the trade or business. That being so, it is immaterial whether it be incurred through negligence or carelessness or even illegality. If the proprietor of a newspaper be mulcted in damages for a libel, that would be a loss incidental to his business, and clearly deductible.

[WARRINGTON L.J. A criminal libel would be nearer this case.]

It is submitted the same result would follow there also.

(1) [1919] 2 K. B. 444.

(2) (1886) 18 Q. B. D. 276.

The risk which the appellants ran in trading with Scandinavia and Russia of becoming liable to penalties under the Act of 1915 was a risk incidental to their trade.

On the principles settled by the House of Lords, it is submitted that the penalties and costs which they thereby incurred ought to be allowed as deductions. It is a complete revolution to suggest that there is any difference between a fine and any other commercial loss. In *Usher's Wiltshire Brewery* v. *Bruce* (1) the company were held entitled to deduct legal costs incurred by them in proceeding against tenants of their tied houses.

[LORD STERNDALE M.R. referred to s. 220 of the Customs Consolidation Act, 1876. I do not know where the power to commit for default comes from.

WARRINGTON L.J. Sect. 139 is the section under which the order is made requiring a declaration. No penalty is thereby imposed except with regard to explosives.]

The penalty under s. 139 arises under s. 5 of the Act of 1915.

[LORD STERNDALE M.R. I think this is probably governed by s. 225 of the Act of 1876. It only occurred to me whether it might not make a difference whether these were civil or criminal proceedings.]

In the Annual Practice, 1920, vol. ii., p. 2018, it is stated that an appeal lies in the case of an information by the Attorney-General to recover penalties.

[*Sir Ernest Pollock S.-G.* referred to *Attorney-General* v. *Bradlaugh* (2) and *Darlow* v. *Shuttleworth*. (3)]

In *Attorney-General* v. *Radloff* (4), which was a case of smuggling, the question as to what constituted a crime was discussed.

It is submitted (1.) that the question what are profits and gains is a pure question of fact—namely, what in the view of a commercial man are the profits and gains of the particular trade or business ; (2.) that whether the loss is a "loss connected with or arising out of" the trade or business within the meaning of s. 100, Sched. (D), Case 1, Rule 3, is

(1) [1915] A. C. 433.
(2) (1885) 14 Q. B. D. 667.
(3) [1902] 1 K. B. 721.
(4) (1854) 10 Ex 84, 96.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

again a question of fact; and (3.) that the relevance of legality or illegality depends upon the scope of the adventure.

Dyer v. *Munday* (1) was a case in which criminal liability came within the scope of the particular trade, and it was held that the principal was liable for the act of his servant.

It is always a question of the authority of the person committing the unlawful act whether penal losses arise in the scope of the venture. Where in carrying on a lawful trade some unlawful act is done the question whether the liability is one which can properly be regarded as a loss is a question of fact for the determination of the Commissioners. The House of Lords have held that a trader may deduct every commercial loss except those which by express provision in a statute he is prohibited from deducting. On the findings in this case no commercial man would say there was a profit until this loss had been deducted. Income tax is a share of the profits. The only thing that is taxed is the balance of profits and gains. The question whether the Income Tax Acts apply to an unlawful trade is quite a different matter. The appellants' trade is not an unlawful trade.

[LORD STERNDALE M.R. How can the doing of a thing which is illegal be incidental to carrying on the business?]

The Court must consider whether the mens rea is present. The Commissioners have here found that the penalties were incurred without any moral turpitude on the part of the appellants.

Usher's Case (2) establishes that the first point to arrive at is what in the view of a commercial man are the profits of the business. The test is, would an auditor pass a balance sheet in which the deduction of this loss was not set off against profits? and it is submitted he would not. See also *Sun Insurance Office* v. *Clark*. (3) In the present case, if the judgment of Rowlatt J. stands something is taxed which is not a profit.

Then is this loss one of those things which the statute says shall not be deducted? On this the appellants have the

(1) [1895] 1 Q. B. 742. (2) [1915] A. C. 433, 462.
(3) [1912] A. C. 443, 455.

finding of the Commissioners in their favour which is sufficient for them—namely, "that the fine or loss of 3000*l.* and costs was incurred by the respondents (the present appellants) in the course of carrying on their trade, and is incidental thereto." Whether or not this was a loss arising out of the trade was a question of fact to be decided by the Commissioners: *Usher's Case* (1); *Smith* v. *Lion Brewery Co.* (2); *Smith* v. *Incorporated Council of Law Reporting for England and Wales.* (3)

Further, this deduction is not one of the things which is expressly prohibited by statute: *Strong & Co.* v. *Woodifield.* (4)

Sir Ernest Pollock S.-G. and *R. P. Hills* for the Commissioners. The judgment of Rowlatt J. is right, and ought to be affirmed. In determining the profits arising from the trade or business assessable to excess profits duty neither of the two sums in question is an allowable deduction under the Finance (No. 2) Act, 1915, and the Income Tax Acts. For the purposes of excess profits duty the profits are to be determined on the same principles as those on which they would be determined for the purposes of income tax, subject to certain modifications referred to in s. 40, sub-s. 1, of the Act of 1915, none of which apply to the present case.

By the Income Tax Act, 1842, s. 100, Sched. (D), Case 1, Rule 3: "In estimating the balance of profits and gains chargeable under schedule (D), for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains . . . . on account of loss not connected with or arising out of such trade, manufacture, adventure or concern. . . . ." By Rule 1 of the rules applying to Cases 1 and 2: "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure,

(1) [1915] A. C. 433, 466.
(2) [1911] A. C. 150, 156, 157.
(3) [1914] 3 K. B. 674.
(4) [1905] 2 K. B. 350, 356; [1906] A. C. 448, 452.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

or concern, or of such profession, employment, or vocation. . . ." Sect. 159 enacts that it shall not be lawful to make any other deductions in computing duties to be charged than such as are expressly enumerated in the Act. By Rule 1 of Case 1 : " The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern, upon a fair and just average of three years . . . . without other deduction than is hereinafter allowed." Certain specific deductions are allowed by the Act which are stated in a negative form. Under this Act it is submitted that neither of the sums in question is an allowable deduction. Neither sum represents a loss connected with or arising out of the trade within the meaning of Rule 3 of Case 1 of Sched. (D), s. 100, of the Act of 1842. Neither sum represents money exclusively paid out or expended for the purposes of trade within the meaning of Rule 1 of Cases 1 and 2 of Sched. (D), s. 100, of that Act. In all the cases the test is whether the expenditure sought to be deducted was necessary in order to enable the trader to earn the profits. Here it was not necessary for the appellants so to conduct their business as to bring themselves within the penal sections of the Customs (War Powers) Act, 1915. The loss was no doubt an incidental expense, but it was not a necessary outlay to enable the appellants to earn the profits.

In *Rhymney Iron Co.* v. *Fowler* (1), where the owners of a colliery, who were subscribers to a coalowners' association, which indemnified its subscribers against losses by strikes, in returning the profits of the colliery for income tax purposes claimed to deduct the yearly average excess of their contributions over the amounts received by them as indemnities, it was held that the money sought to be deducted was not money wholly and exclusively laid out for the purposes of trade, and therefore that the deduction could not be allowed. Pollock B. there said : " There are a great many things that a prudent trader might treat as deductions, because he wished to make a fund to provide against future accidents, and things

(1) [1896] 2 Q. B. 79. 83.

of that kind, which are not dealt with at all by the Income Tax Acts." The test is not, as has been contended, whether these penalties would be included as a loss in a balance sheet. As was said by the Lord President in *Coltness Iron Co.* v. *Black* (1): "The statute refuses to take an ordinary balance sheet, or the net profits thereby ascertained, as the measure of the assessment, and requires the full balance of profits, without allowing any deduction except for working expenses, and without regard to the state of the capital account or to the amount of capital employed in the concern, or sunk and exhausted, or withdrawn. Any other construction of the statute would not only be inconsistent with the leading principle on which it is based and with its express words, but would lead to very embarrassing consequences."

[They were stopped.]

A. M. Latter in reply referred to Short and Mellor's Practice of the Crown Office, 2nd ed., p. 151 : *Rex* v. *Hausmann.* (2)

LORD STERNDALE M.R. This is an appeal from Rowlatt J., who, in coming to a conclusion as to the amount of profits upon which excess profits duty was to be levied in the case of the appellants, decided that the sum which they had to pay for a penalty under the Customs (War Powers) Act, 1915, and the costs which they had incurred in defending themselves against the proceedings which compelled that payment, were not proper deductions to be taken into account in arriving at the balance of the profits.

The facts are these : The appellants are a firm of high standing, carrying on business in London. They were established a long time ago, and it is said that the directors and the secretary of the company are all natural-born British subjects. A great part of their trade consisted in the exporting of goods to Russia and Scandinavia. In the case with which we are concerned some goods were exported to Russia, and proceedings were taken against the appellants under s. 5, sub-s. 1,

(1) (1881) 1 Tax Cas. 287, 308; affirmed on appeal (1881) 6 App. Cas. 315.

(2) (1909) 3 Cr. App. R. 3 ; [1909] W. N. 198.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

Lord Sterndale M.R.

of the Customs (War Powers) Act, 1915, which provides that "Where in pursuance of any order made by the Commissioners of Customs and Excise under s. 139 of the Customs Consolidation Act, 1876, a person in the course of making entry before shipment makes a declaration as to the ultimate destination of any goods"—that was done in this case—"then . . . . the exporter shall, if so required by the Commissioners of Customs and Excise, produce evidence to their satisfaction that those goods have not reached a destination in any territory which," to put it shortly, may be called enemy territory, "and if he fails to do so he shall be liable to a penalty of treble the value of the goods or 100*l.* at the election of the Commissioners, unless he proves that they reached such destination without his consent or connivance, and that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration."

Under that section proceedings were taken by information in the King's Bench Division against the appellants, and on the hearing of the case it was agreed between the Attorney-General, who represented the Crown, and the learned counsel, who represented the appellants, that they had no defence under the latter part of the section, because they were not able to prove that they took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration. There was no judgment, therefore, I think, recorded against the appellants, but they submitted to pay the 3,000*l.*, which was agreed to be the sum they should pay, and they also incurred costs to the extent of something over 1,000*l.* in defending themselves.

Now we had several authorities cited to us which seemed to establish that such proceedings as those are not technically criminal proceedings. I do not think that matters. They certainly are proceedings in which a penalty is being sued for by the Attorney-General as representing the Crown, for an infraction of the law, whether technically criminal for the purpose of appeal seems to me to be immaterial. The money which is paid is money paid as a penalty, and it does not

matter in the least that the Attorney-General elected to take treble the value of the goods, nor does it matter that it may be called in the informations a forfeiture. It is in fact, under the section, a penalty.

The question is whether the appellants are entitled in arriving at the balance of their profits to deduct that sum as they deduct the other expenses of trading, or any loss that may be occasioned in the trading, from the gross profits in order to arrive at the balance of profits. That is governed, it seems to me, by three rules of the Income Tax Act, 1842. The first is Rule 1 of Case 1 : "The duty to be charged in respect thereof"—"thereof" being any trade, manufacture, adventure, or concern in the nature of trade—"shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern, upon a fair and just average of three years," and so on. Rule 3 provides that "In estimating the balance of profits and gains chargeable under Schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains . . . . on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern." Then having established those rules for the purpose of dealing with Case 1, the Legislature proceeded to enact another rule (Rule 1) which deals with both Case 1 and Case 2 under Sched. (D), and that provides : "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation."

The argument for the appellants is that you must look at what is, in fact, the actual sum that the appellants put into their pockets, and that it does not matter in the least that the sum which they seek to deduct is a sum which they had

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

Lord Sterndale M.R.

to pay for a penalty imposed upon them for an infraction of the law. The appellants have had to pay this 3000*l.*, and they have had to incur the costs which I have mentioned. If they cannot deduct those sums from their profits which are calculated for the purposes of excess profits duty, it may seem as if they had to pay the excess profits percentage upon that very sum which they have had to pay for the penalty. It may be so, and it may seem hard, because it was agreed that there was no moral obliquity, to use the expression which is used in all these cases, to be attributed to the appellants. But the case for the appellants was rested upon the broad principle that it does not matter whether the expense is incurred in consequence of an infraction of the law or whether it is a penalty for doing an illegal act, so long as it is something which reduces the amount which comes into the traders' pockets as the result of his trading. One instance was put, that a man who in dealing in any kind of article adulterates it, and has been fined from time to time during the year in question for adulteration, is entitled to deduct in the assessment of his profits either to income tax or excess profits duty, the fines which have been imposed upon him for adulteration. Another instance suggested by the learned counsel for the appellants was that a licensed victualler who has made considerable profits during the year under consideration by selling intoxicating liquor to drunken persons and has been fined for it, is entitled to deduct, in assessing his profits, the fines that he has had to pay for that breach of the licensing laws, and he argued the case on the broad principle that in such instances the deductions would be permissible. I cannot find, and perhaps it is not surprising that I should be unable to do so, any authority in which the actual point has been considered. But there are some remarks of Lord Davey in *Strong & Co.* v. *Woodifield* (1), to which we were referred, which perhaps throw some little light upon the matter. It was quite a different class of deduction with which he was there dealing, but he said that "Case 1 relates to trades, manufactures, adventures, or concerns in the nature of trade,

(1) [1906] A. C. 448, 453.

and I think that the word 'loss' in Rule 3 means what is usually known as a loss in trading or in speculation. It contemplates a case in which the result of the trading or adventure is a loss, wholly or partially, of the capital employed in it. I doubt whether the damages in the present case can properly be called a trading loss. I prefer to decide the case upon Rule 1, which applies to profits of trades and also to professions, employments, or vocations. I think that the payment of these damages was not money expended 'for the purpose of the trade.' These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade."

Now what is the position here? This business could perfectly well be carried on without any infraction of the law. This penalty was imposed because of an infraction of the law, and that does not seem to me to be, any more than the expense which had to be paid in *Strong & Co.* v. *Woodifield* (1) appeared to Lord Davey to be, a disbursement or expense which was laid out or expended for the purpose of such trade, manufacture, adventure or concern, nor does it seem to me, though this is rather more questionable, to be a sum paid on account of a loss connected with or arising out of such trade, manufacture, adventure, or concern.

Of course, as Rowlatt J. said, in a sense you may say that it was connected with the trade, because if the trade had not been carried on the penalty would not have been incurred; there would have been no opportunity for the breach of the law which took place; but in the sense in which the words are used in the Act, I do not think that this was connected with or arising out of such trade, manufacture, adventure, or concern, and still less do I think that it was a disbursement under Rule 1, which applies to the first two cases, that is to say, "money wholly and exclusively laid out or expended for

(1) [1906] A. C. 448.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

Lord Sterndale M.R.

the purposes of such trade." During the course of the trading this company committed a breach of the law. As I say, it has been agreed that they did not intend to do anything wrong in the sense that they were willingly and knowingly sending these goods to an enemy destination; but they committed a breach of the law, and for that breach of the law they were fined. That, as it seems to me, was not a loss connected with the business, but was a fine imposed upon the company personally, so far as a company can be considered to be a person, for a breach of the law which it had committed. It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading. For that reason I think that both the decision of Rowlatt J. in this case, and his former decision in *Inland Revenue Commissioners* v. *Warnes & Co.* (1), which he followed, were right, and that this appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The question that has to be determined is whether for the purposes of ascertaining the amount of excess profits on which excess profits duty is to be charged the appellants are entitled to deduct a sum which they have had to pay by reason of the fact that they incurred a penalty for not having taken, or not being able to prove that they had taken, all reasonable steps to secure that the ultimate destination of certain goods shipped by them should be the destination mentioned in the declaration they were required to make by s. 5 of the Customs (War Powers) Act, 1915; that is to say, they desire to deduct from the gross amount of their profits a sum which they have had to pay by reason of their infraction of the law. The case is of some importance, not so much for the facts of the particular case which we have to decide, but because the argument of the appellants amounts, and perhaps must amount, to this, that if a trader carrying on business and earning profits, in the

(1) [1919] 2 K. B. 444.

course of carrying on that business incurs penalties whether it be because he adulterates his goods, or in the case of a publican because he commits breaches of the laws relating to licensed houses, or in the case of a person engaged in any other business which is subject to regulations because he breaks those regulations, such a trader is entitled to treat for the purposes of income tax his profits as reduced by the amount of the penalties he has had to pay. Now it would, I think, be an extremely serious thing if that proposition could be established in the way it has been put before us, and therefore the case is of some importance and requires careful consideration. The first thing I desire to say about it is that, in my opinion, the question whether this deduction is to be allowed is one that must be determined by the rules regulating the assessment of income tax and not by rules regulating what may be allowed in the preparation either for a company, an individual, or a firm, of the balance sheet or the profit and loss account. A firm or a company carrying on business may within certain limits treat as a deduction from profits such sum as it pleases, but for the purposes of income tax the deductions which may be allowed from the gross profits are strictly regulated by the Income Tax Acts.

The material provisions of the Income Tax Act, 1842, with which we have to deal, taking them a little out of the order in which they occur in that Act, are first, s. 159, which is a general section relating to the computation of duties charged under the Act, and provides that in the computation of those duties "it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act." Then in s. 100, Sched. (D) of the Act, which relates to the particular subject-matter with which we are dealing, namely, the profits of the trade or business, we find Case 1 relating to the duties under Sched. (D) "Duties to be charged in respect of any trade," Rule 1 of which provides that "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years . . . . and shall be assessed, charged and

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

Warrington L.J.

paid without other deduction than is hereinafter allowed." Then there follow the rules relating to that case, that is profits on trade, and the deductions are expressed in Rule 3 in a negative form: "In estimating the balance of profits and gains chargeable under Schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of" several matters which are enumerated, and in particular "nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern."

Then there follows another set of rules applying both to Case 1 which relates to trade, and Case 2 which relates to professions, Rule 1 of which provides that "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade."

Now I think it is pretty obvious why those two rules have been framed in the way they have. In the case of a trade loss is not always, or perhaps one may even say is not in general, measured by a definite expenditure of money. Loss in trade arises in many ways—from the depreciation of goods, from the increase or decrease in prices in the market and from many causes of that kind, and it is not generally measured by some definite sum expended by the person carrying on the trade. It is very seldom that that actually measures the amount of the loss, and for that reason I think Rule 1 of the Rules applying to both the Cases was inserted in order to cover a claim by a trader not for loss in the ordinary sense, but for some definite disbursement or expense, as is expressed in the Act.

In the present case what is sought to be deducted is a definite sum expended by the company, and the question we have to determine is whether that is to be allowed as a deduction. In my view it cannot be allowed, as I have

already said, unless it is one of the deductions allowed by the Income Tax Act. It is a curious fact that the Income Tax Act does not contain any express provision as to what shall or may be allowed to be deducted. The way in which the matter is dealt with by the Act is that it prohibits certain things which are enumerated being allowed as deductions, and impliedly by that means one can find out what may be allowed as deductions. Among the things which may be allowed I think is a loss connected with or arising out of such trade, manufacture, adventure, or concern. Now is the expenditure in this case a loss connected with or arising out of a trade or manufacture? That it arises out of the trade I think may well be conceded. It does arise out of the trade, because if it had not been that the company were carrying on the trade they would not have had to incur this expenditure; but, in my opinion, it is not a loss connected with or arising out of the trade. It is a sum which the persons conducting the trade have had to pay because in conducting it they have so acted as to render themselves liable to this penalty. It is not a commercial loss, and I think when the Act speaks of a loss connected with or arising out of such trade it means a commercial loss connected with or arising out of the trade.

But although it may not therefore be a deduction not prohibited by Rule 3 of Case 1 under Sched. (D), it may possibly be one which is not prohibited by Rule 1 of the rules applying to Cases 1 and 2. Now the deductions which are not prohibited by that rule are disbursements or expenses being money wholly and exclusively laid out or expended for the purposes of such trade. Does the disbursement in question come under that head? In my opinion it does not, and it is in that respect that the remarks of Lord Davey in *Strong & Co.* v. *Woodifield* (1) are of considerable value. [His Lordship read the passage read by the Master of the Rolls and continued:] Now it cannot be said that this disbursement was made in any way for the purpose of the trade or for the purpose of earning the profits of the trade. It was made, as I have already said—and the same remark applies to this rule as to the other—

(1) [1906] A. C. 448, 453.

C. A. 1920

INLAND REVENUE COMMISSIONERS v VON GLEHN.

Warrington L.J.

because the individuals who were conducting the trade had not from any moral obliquity but had unfortunately been guilty of an infraction of the law.

Then it is said that we are precluded from taking the view I have expressed as a matter of law, because the question is really one of fact, and has been answered against the contention of the Inland Revenue Commissioners. In my opinion that is a misapprehension, first, of what is a question of fact and what is a question of law, and also of the real finding of the Commissioners. It seems to me that whether or not a particular sum is, according to the true construction of the Income Tax Acts, a sum which is to be deducted from the gross amount of a man's profits is a question of law, but it has to be decided of course upon the facts which are found by the tribunal to whom the ascertainment of the facts is intrusted. But whether that sum is deductible or not is a question of law, and I think the Commissioners have so treated it in the present case. I think what they purport to have found is a fact, but what they have found is this, that the said fine or loss of 3000*l.* and costs was incurred by the appellants in the course of carrying on their trade, and was incidental thereto. It may be that the expenditure was incurred in the course of the trade, and it may be incidental to the trade, but it does not at all follow that the conclusion which they draw from that, and which they express as their decision, that the deductions are admissible, is a finding of fact. In my opinion it is not, and I do not think the Commissioners purport so to find.

In my opinion the judgment of Rowlatt J. in the present case, which simply follows his previous judgment in *Warnes & Co.'s Case* (1), is correct, and this appeal ought to be dismissed; and of course, in dismissing this appeal we also incidentally affirm the decision in *Warnes & Co.'s Case.* (1)

SCRUTTON L.J. The question which this case raises is whether a trader in presenting the balance of profits and gains for income tax can deduct, either in getting at the balance, or after he has got at it, penalties which have been imposed

(1) [1919] 2 K. B. 444.

on him for carrying on his trade in an unlawful manner, and I confess that to the question so stated it seems to me that the obvious answer is "Of course he cannot." But as Lord Macnaghten once said in the House of Lords, the clearer a proposition is the more difficult it often is to find authority in support of it; and when one comes to state the reasons why that obvious answer should be given perhaps it is not so easy as saying " Of course he cannot."

In this particular case what has happened is this: The Government, for the purpose of the war, thought it right to make it very difficult for goods to be exported to neutral countries unless the person who took the risk of exporting them would run considerable risks, and would take very great precautions to prevent them going to the enemy country. And so the Customs (War Powers) Act, 1915, has required the exporter to state the ultimate destination of the goods, and has then imposed on him a heavy penalty if he cannot satisfy the Commissioners that they have not gone beyond that destination to an enemy country, or that if they have that he took all reasonable steps to secure that they should stay at the ultimate destination.

The appellants in this case have been exporting to neutral countries, and have not been able to satisfy the Commissioners that they took reasonable steps to prevent the goods getting to enemy countries. That is to say, they have been carrying on the business of exporting goods in an illegal way which has subjected them to heavy penalties, and they now seek to deduct from the profits they have made by supplying the goods the penalties which they have had to pay for exporting those goods in an illegal way.

The Income Tax Acts have always been recognized as expressing the procedure by which you are to get at the taxable amount in a very artificial way. They have used the phrase " balance of profits and gains " sometimes in the sense of gross profits before deductions have been made, and sometimes in the sense of the net profits which arise after the proper deductions have been made. They have provided that the tax is to be assessed without other deductions than are

C. A. 1920

INLAND REVENUE COMMISSIONERS v. VON GLEHN.

Scrutton L.J.

"hereinafter" allowed, but they have not inserted any provision allowing deductions; they have inserted a series of provisions prohibiting deductions and dealing with an enormous number of trades, and they have used very vague language as to the deductions which are not allowed. I take for my guidance, at any rate as to what may be allowed, two passages in two judgments in the House of Lords. The first is in *Gresham Life Assurance Society* v. *Styles* (1), where Lord Herschell says: "The expression 'balance of the profits or gains' is not a happy one; but the meaning obviously is the balance arrived at by setting against the receipts the expenditure necessary to earn them." The second is the passage that has been cited by my brothers in Lord Davey's judgment in *Strong & Co.* v. *Woodifield* (2), where he says: "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profit of the trade. It must be made for the purpose of earning the profits."

Now taking those two passages I have read, were these penalties an expenditure necessary to earn the profits? Were they paid for the purpose of earning the profits? The answer seems to me to be obvious, that they were not; they were unfortunate incidents which followed after the profits had been earned. I quite understand that in stating the matter in that way I may leave some difficult questions for solution in subsequent cases. I do not wish to decide until I have heard the matter further argued, whether damages paid in civil proceedings in respect of carrying on business in a negligent manner can or cannot be deducted from the profits, for I quite see that on the language that I have used questions may arise as to such damages.

I do not wish in the present case to decide the question, as it may arise in a future case, whether these particular proceedings were civil or criminal proceedings. I am inclined to think, though I do not wish finally to decide it, that the Income Tax Acts are to be confined to lawful businesses, and to businesses carried on in a lawful manner. I do not think

(1) [1892] A. C. 309, 323. (2) [1906] A. C. 448, 453.

that Denman J. in *Partridge* v. *Mallandaine* (1) meant to say anything contrary to that. He was there dealing with a betting case, and since some betting is not illegal, but is invalid in the sense that the Courts will not enforce betting contracts, whilst other betting is illegal in the sense that it is punishable, I rather think that his language is used with reference to a case of betting which was invalid or unenforceable, not illegal. If he means to say that the Income Tax Acts recognize illegal businesses in the sense of businesses which it was not legal to carry on, because they were punishable, I at present very much doubt whether any such extension of the Acts is possible. But on this particular question, whether in the case of these penalties imposed on the traders because they had so acted in exporting goods as to break the law, they can say that the penalties were paid for the purpose of earning profits or were expenditure necessary to earn the profits, I have no doubt that they cannot, and for that reason I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants : *Beaumont, Son & Rigden.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

(1) 18 Q. B. D. 276.

W. I. C.

C. A.

[IN THE COURT OF APPEAL.]

1919
Dec. 15, 16, 17.

FOSTER BROTHERS *v.* GREAT EASTERN RAILWAY COMPANY.

1920
March 30.

Railway—Terminal Charges—"Services rendered by company at or in connexion with sidings not belonging to company"—Station Accommodation—"Conveyance"—When it ends—Use of Trucks—Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxiv.*), *Sched., ss.* 2, 3, 5—*Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 4.

By s. 2 of the schedule to the Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. . . . ."

By s. 3: "The maximum station terminal is the maximum charge which the company may make to a trader for the use of the accommodation (exclusive of coal drops) provided, and for the duties undertaken by the company for which no other provision is made in this schedule, at the terminal station for or in dealing with merchandise, as carriers thereof, before or after conveyance."

By s. 5: "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate . . . .: (I.) Services rendered by the company at or in connexion with sidings not belonging to the company . . . . . (IV.) The detention of trucks . . . . beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof . . . . And services rendered in connexion with such use . . . .":—

Held, that "conveyance" for the purpose of rates might or might not coincide with the contractual conveyance but that it could not be said as a matter of law that it did. The point at which it ended would be ascertained prima facie by the point at which the goods train detached and deposited the trucks, but if they were so detached and deposited for the convenience of the railway company at a point short of that to which as conveyers they would be bound to take them for the purpose of delivery to a distributing carrier in times when such carriers existed, a charge could not be made for haulage between those points. This applied to station traders as well as to private siding owners although they, as using the station, were liable to terminal charges to which sidings owners were not liable.

Hall v. *London, Brighton & South Coast Ry. Co.* (1885) 15 Q. B. D. 505;

Sowerby v. *Great Northern Ry. Co.* (1891) 7 Ry. & Can. Traff. Cas. 156; *North Staffordshire Ry. Co.* v. *Salt Union* (1898) 10 Ry & Can. Traff. Cas. 161, followed.

Held, also, that if *Manchester, Sheffield & Lincolnshire Ry. Co.* v. *Pidcock & Co.* (1896) 10 Ry. & Can. Traff. Cas. 150, laid down as a proposition of law applicable to all cases that conveyance for the purpose of charge stopped at the point where it was reasonable to use the train engine, that decision could not be supported.

Decision of Railway and Canal Commissioners on this point reversed, and case remitted to them for rehearing.

Held, further, that the use of trucks paid for in the conveyance rate did not end until a reasonable time had been afforded to the consignee to take delivery of his goods, and that when that reasonable time had been exceeded demurrage began.

Decision of Commissioners on this point affirmed.

APPEAL from a decision of the Railway and Canal Commissioners (Lush J., Lord Terrington and Tindal Atkinson K.C.).

The appeal arose out of an application under s. 4 of the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), by Foster Bros. against the Great Eastern Railway Company for allowances and rebates on rates charged in respect of their traffic delivered to and received at Cambridge.

By s. 2 of the schedule to the Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxiv.): "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. . . . ."

By s. 3: "The maximum station terminal is the maximum charge which the company may make to a trader for the use of the accommodation (exclusive of coal drops) provided, and for the duties undertaken by the Company for which no other provision is made in this schedule, at the terminal station for or in dealing with merchandise, as carriers thereof, before or after conveyance."

By s. 5: "The company may charge for the services hereunder mentioned, or any of them, when rendered to a

C. A. 1919

FOSTER v. G.E.R. CO.

trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience.

"(I.) Services rendered by the company at or in connexion with sidings not belonging to the company. . . . .

. . . . . .

"(IV.) The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof. . . . . And services rendered in connexion with such use and occupation."

The following statement of facts is taken from the judgment of the Commissioners delivered by Lord Terrington :—

"The applicants are flour millers at Cambridge and their warehouses and mills are connected by private sidings on their own land with the lines and sidings of the railway company by means of certain lines and sidings of the defendants (coloured pink on the plan) of which the applicants are licensees under an agreement in writing dated November 27, 1916.

"The applicants complain that the rates charged to them are the same as those charged to traders whose similar traffic is dealt with at and make use of the station of the defendants at Cambridge although the latter do not supply station accommodation nor perform terminal services (other than sheeting) in connection with the applicants' traffic. The railway company admit the equality of the rates charged and that they do not provide station terminal accommodation at Cambridge for the applicants but they deny that they do any terminal service for traders at their station or that any charge for such services is included in the station rates, and

they contend that the services rendered and the accommodation provided by them at or in connection with the applicants' sidings justify the equality of the charge.

"By the above-mentioned agreement the user of the pink sidings by the applicants was restricted to through traffic and a right of user over them for their own purposes was reserved by the defendants.

"It was also expressly stipulated by clause 5 of the agreement that the haulage to and from the pink sidings from and to the applicants' premises should be performed by and at the expense of the applicants, but that the defendants should perform all the services necessary for delivering or receiving the trucks at the pink sidings. It was also provided that nothing therein contained should affect the right of the applicants to any claim for allowance or rebate in respect of terminal charges.

"The applicants' own siding connecting with the company's pink siding for traffic inwards is about 120 feet long and will accommodate five trucks. Their private siding for traffic outwards (coloured green) connecting with the company's outward pink siding is about 400 feet long and will accommodate about seventeen trucks. The traffic is worked as follows: The running lines into and out of Cambridge station are due north and south. The up goods line runs due south and the down goods line from London runs due north. On each side of these running roads are lines parallel with them coloured blue and brown which the company designate as reception sidings. Trucks containing inwards traffic are detached from the train standing on the up or down running line and are drawn off on to the lines coloured blue called No. 1 siding and back goods road siding respectively, and are there sorted. Those on the eastern blue line intended for station traders at Cambridge and for Foster's siding are then drawn off by the company's engine over Hills Road on to the western side of the station and are pushed back into certain blue sidings situated in the goods yard at Cambridge station. Traders receive advice notes of the arrival of their goods when they reach the coalfield sidings on the western side of the goods

C. A. 1919

FOSTER v. G.E.R. Co.

yard and they take delivery of them there. The applicants' trucks inwards on the down line are sometimes backed direct on to the pink sidings after being hauled from what are called the reception sidings; sometimes they are hauled from the coalfield sidings and thence backed on to the pink sidings. Inward trucks which come in over the blue lines on to the pink siding and then on the applicants' own siding when they reach the turntable are turned by the applicants' man and horse on their own turntable into their warehouses." Then followed a description of the handling of the trucks after they reached the railway company's premises, which is not necessary for this appeal:

The services in respect of which the defendants claimed to charge were thus stated: "The real issue in the case turns therefore on the nature and value of the services which the defendants allege that they render. These services are particularised under the following heads: (*a*) Shunting to and from reception and marshalling sidings and coalfield sidings." Then there were some others to which it is not necessary to refer. Then followed some other services not material to the question now before the Court except one as to the provision of trucks which raised a separate and subsidiary point dealt with later, and the judgment went on to explain the points made as to shunting in these words: "The claim for shunting is based on the assumption that the service of conveyance comprised in the tonnage rate ends as soon as the traffic of the applicants reaches the reception siding (No. 1 blue) in the case of the inwards traffic or begins from the back road siding in the case of the outward traffic, and that the marshalling done by the company's engine on the sidings adjoining the running road and the haulage from thence to Hills Road and across the points to and from the coalfield sidings is not incidental to conveyance but is in the case of traders' traffic part of a service of delivery which is comprised in the station terminal and in the case of the applicants' traffic is a service rendered at or in connection with their private siding. This raises the question as to when the conveyance ends. Does it end as the defendants

contend in case of the inward traffic when the trucks are detached from the train standing on the running road and then are shunted for marshalling into reception sidings or does it end when the trucks are placed in the position in Cambridge goods station where traders can and do take delivery of their goods? In practice that position is on the coalfield sidings.

"The obligation of the company for their station rate is not only to carry but to deliver the goods at the station or at least to place the goods at the station in such a position that the trader can obtain convenient access to them so as to take delivery. The S. to S. class rate embraces in one sum the aggregate charges for conveyance for terminal accommodation and for terminal services the maxima whereof are fixed in the schedule to the Rates and Charges Order. The station rates in question were 'exceptional' rates (that is to say, rates lower than the class rates) and were stated in the rate book not to include the services of loading and unloading.

"It was conceded by defendants' counsel that the marshalling done on the reception sidings was for the convenience of the company and was a charge incidental to conveyance and comprised in the tonnage rate, but it was claimed that all the services and accommodation other than marshalling after the detachment of the trucks from the train were services which were not incidental to conveyance but were in the case of the station trader attributable to delivery and covered by the station terminal, and in the case of the siding trader were chargeable under s. 5 of the charging order. This Court decided in the case of the *Birmingham Corporation* v. *Midland Ry. Co.* (1), that 'conveyance' properly so called does not terminate until the siding points are reached but that it was a question of fact in each case whether the service rendered is incident to conveyance or due to request express or implied of the freighter. As was pointed out in that case in determining whether a service was incidental to conveyance you must have regard to the whole circumstances including the position of the siding, the configuration and area of the

(1) (1909) 14 Ry. & Can. Traff. Cas. 24.

C. A. 1919

FOSTER v. G.E.R. Co.

works, together with their internal requirements and the volume of the traffic in and out which has to be dealt with. The facts of that case were special and peculiar and the special services charged for were necessitated by the inadequacy of the works at the private sidings to accommodate the enormous traffic dealt with at such sidings. In this case it is clear that the defendants cannot fulfil their obligation of conveying the station traffic and placing it in the position that the trader can receive it at the coalfield sidings without for their own necessary convenience, owing to the configuration of their station and the way their sidings are constructed, doing the shunting and haulage backwards and forwards from the eastern to the western side of the station over the Hills Road points to the coalfield siding. Up to this point I think the service is one incident to conveyance which does not end until that point is reached. Similarly I think it is the duty of the defendants to place the applicants' traffic on their pink sidings. They have expressly contracted by their agreements to perform all the services necessary for delivering or receiving the trucks at these sidings. The applicants admit that some extra shunting has occasionally to be done by the defendants for which they are willing to pay. They also admit that they have to pay for the services of the two men claimed for and for certain clerkage services and for outward sheeting, and they assess the value of these services at about $2\frac{1}{2}d.$ per ton. I think the value of these services is under-estimated by the applicants."

A large part of the defendants' claim for services was that for provision of trucks before and after conveyance. The basis on which this charge was put forward was that it was for a service rendered " at or in connection with the siding."

As to this claim the Commissioners said that it did not purport to be a claim for demurrage or detention of trucks under sub-s. (IV.) of s. 5 of the Charging Order under which a charge could only be made where a reasonable time had elapsed for taking delivery after conveyance was terminated, but the charge was for use of trucks between the arrival at the reception sidings and the period when demurrage would

properly become chargeable under the terms of the Charging Order. That would be during the period when the defendants' obligations as carriers and not as warehousemen existed, and the charge for conveyance by s. 2 of the Charging Order included the provision of trucks as an incident of such conveyance, and the additional charge was not then in their judgment authorized by the terms of the Order, and was altogether untenable. For the reasons indicated in their judgment the Commissioners were of opinion that some of these services were misconceived. On the other hand the defendants appeared to them not to have given sufficient consideration to the fact that all the applicants' traffic was loaded and unloaded on their own premises. By owning and utilizing their own sidings they saved the railway company a good deal of expense in not having to lay out money in providing additional accommodation for the handling of their traffic. Taking all the circumstances into consideration they came to the conclusion that it would be just and reasonable to allow the applicants an allowance or rebate of 3*d.* per ton.

The defendants appealed. The appeal was heard on December 15, 16, 17, 1919.

Sir Lynden Macassey K.C., *Disturnal K.C.* and *Bruce Thomas* for the appellants.

Talbot K.C. and *A. T. Miller K.C.* for the respondents.

The arguments are fully stated in the judgments.

The following cases and Acts were referred to: *Hall* v. *London, Brighton & South Coast Ry. Co.* (1); *Sowerby* v. *Great Northern Ry. Co.* (2); *Birmingham Corporation* v. *Midland Ry. Co.* (3); *Vickers, Sons & Maxim* v. *Midland Ry. Co.* (4); *Cowan & Sons* v. *North British Ry. Co.* (5); *Aberdeen Commercial Co.* v. *Great North of Scotland Ry. Co.* (6); *North Staffordshire Ry. Co.* v. *Salt Union* (7); *Greaves* v.

(1) 15 Q. B. D. 505.
(2) 7 Ry. & Can. Traff. Cas. 156.
(3) 14 Ry. & Can. Traff. Cas. 24.
(4) (1902) 11 Ry. & Can. Traff. Cas. 249.
(5) (1901) 11 Ry. & Can. Traff. Cas. 271.
(6) (1878) 3 Ry. & Can. Traff. Cas. 205.
(7) 10 Ry. & Can. Traff. Cas. 161.

C. A. 1919

FOSTER v. G.E.R. Co.

Tofield (1); *Stone & Co.* v. *Midland Ry. Co.* (2); Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 5, sub-s. 3; s. 20; s. 24, sub-s. 10; Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxiv.) Sched., s. 26; Railways Clauses Act, 1845 (8 & 9 Vict. c. 33), s. 94; Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14.

Cur. adv. vult.

1920. March 30. LORD STERNDALE M.R. read the following judgment: This appeal arises out of an application by Foster Bros., whom I shall call the plaintiffs, against the Great Eastern Railway Company, whom I shall call the defendants, for a rebate on the charges made on them in respect of their traffic delivered to and received from their private sidings at Cambridge. The application is made under s. 4 of the Railway and Canal Traffic Act, 1894, which is as follows: "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate." The ground upon which the plaintiffs claim the rebate is that the rates charged to them are the same as those charged to traders in respect of similar traffic dealt with at Cambridge station notwithstanding the fact that the defendants do not supply station accommodation other than shunting to the plaintiffs in respect of their traffic. The defendants admit that the rates charged to the plaintiffs and the other traders are the same and that they do not provide station terminal accommodation for the plaintiffs,

(1) (1880) 14 Ch. D. 563, 571.
(2) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

but they deny that they do any terminal services for traders at their station or that any charge for such services is included in the station rates, and they contend that the services rendered and the accommodation provided by them at or in connection with the plaintiffs' sidings justify the equality of the rate.

The charge for services in connection with the sidings is based upon the Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891, Sched., s. 5, which is in these terms. [His Lordship read the section.] It is also necessary to read ss. 2 and 3 of the same schedule. [His Lordship read them and continued:] The Commissioners following the usual and convenient practice dealt with the case as if they had before them in addition to the plaintiffs' application under the Railway and Canal Traffic Act, 1894, s. 4, an application by the defendants under the Great Eastern Railway Company (Rates and Charges) Order Confirmation Act, 1891, Sched., s. 5, which had been referred to them as arbitrators and examined whether in the whole the charge made by the defendants was justified. They allowed the defendants some charge for services under s. 5 of the schedule to the Great Eastern Railway Company Act, but on the whole allowed a rebate to the plaintiffs. The defendants appealed on the ground that the Commissioners in arriving at their decision had misconstrued s. 2 of the schedule to the Great Eastern Railway Company Act in a manner which I shall state more fully later, and had in consequence proceeded upon a wrong principle in their determination of the facts.

The circumstances in which the question arises are so clearly stated in the judgment of the Commissioners delivered by Lord Terrington, that I think my best course is to read it. [His Lordship read the passages from the judgment above set out, and referring to the passage commencing with the words: "This Court decided, in the case of the *Birmingham Corporation* v. *Midland Ry. Co.*" (1) and ending with the words "I think the value of these services is underestimated by the applicants" continued:] The objection taken to this passage is that it is said to lay down

(1) 14 Ry. & Can. Traff. Cas. 24.

C. A. 1920

FOSTER v. G.E.R. Co.

Lord Sterndale M.R.

as a matter of law that conveyance for the purpose of charges does not come to an end until the trucks are placed in a position when the consignee can take delivery, in this case the point where the railway sidings are reached, and that up to that point the service of shunting in the manner before described is a service incident to conveyance. The plaintiffs contended before us that the Commissioners did not intend to lay down any such rule of law, and that the passages I have read were merely statements of the reasons which led the Commissioners to a finding of fact as arbitrators that in this particular case conveyance did not end until that point. If it were only such a finding of fact we could not interfere with it. Two questions therefore arise. Did the judgment state the proposition above mentioned as a rule of law, and if so was it right ?

The passage to which most exception was taken—namely, that beginning "Conveyance properly so called"—is taken verbatim from a judgment of Lawrence J. in a case in which the facts were different; and I have considerable doubt whether the Commissioners intended to lay down a rule of law, and a reference to the case cited does not remove that doubt.

We must, however, take the judgment as it is stated in the words before us, and looking at it in that way I think it does on the face of it state the meaning of conveyance as one to be accepted generally, and so as a rule of law.

It is necessary, therefore, to consider whether so stated it is correct. The two main authorities upon which the defendants relied as showing that it was incorrect were the cases of *Hall* v. *London, Brighton and South Coast Ry. Co.* (1), particularly the judgment of Wills J., and *Sowerby* v. *Great Northern Ry. Co.* (2) In the former case Wills J. defined the meaning of conveyance by a historical review of the connection of railway companies with the carriage and conveyance of goods. He showed that there were three stages, and thus described them: "Three states of things were from this point of view to be expected and to be provided

(1) 15 Q. B. D. 505 536, 539. (2) 7 Ry. & Can. Traff. Cas. 156.

for by legislation. The company might be merely the owners of a highway and toll-takers for the use of it by other people with their own carriages and locomotives. That state of things would be worked out by the railway company possessing the mere line of railway from end to end, and by the persons making use of it, buying or renting contiguous land whereon to keep their rolling stock, and have their offices, availing themselves of the powers of s. 76 of the Act of 1845, and getting on to the railway by means of sidings connected with the railway. A second state of things, as we know from the evidence in this case to which by the consent of the parties we are at liberty to refer, prevailed extensively for many years after the railway system was in full operation, and for some years at least after the passing of the Act of 1845. The railway company provided the line and provided the engines and trucks, but they were not carriers. The large warehouses and sheds wherein goods were received, sorted, loaded, covered, checked, weighed and labelled, and trucks or carriages marshalled and prepared for convenient removal to their various places of destination—a corresponding work was done in respect of goods arriving from a distance—the staff of clerks, bookkeepers, porters, workmen, and horses necessary for these operations were all provided and maintained at the expense of the carrier, and no portion of it fell upon the company. The company, on the other hand, as owners of the rolling stock, for the use of which as well as of their railways they received payment, provided whatever accommodation they needed in order to keep in convenient proximity to the places where the carrier had his depots the necessary supply of rolling stock. The third state of things which might exist simultaneously with the second, or might be the one prevailing exclusively on a particular line, existed when the company were themselves the carriers of the goods, and when as carriers they provided the accommodation and performed the services above described." He held that in the third case the charges for conveyance only covered the services up to the points where the duties of the railway company as conveyers ended and their duties as carriers

C. A. 1920

FOSTER v. G.E.R. Co.

Lord Sterndale M.R.

began. He points out in the following passage that these charges are imposed according to a mileage rate, while many of the charges made as carriers could not be so measured. Then he says: "The charges of and incidental to 'conveyance,' as we have explained that phrase, are properly measured by the mile of distance travelled over. The terminal services of station accommodation, loading, watching, checking and the like, have no common measure with the distance run, and are the same, whether that distance be two or two hundred miles." This case was considered by the Court of Appeal in *Sowerby* v. *Great Northern Ry. Co.* (1), and the judgment of Wills J. was approved. In that case the applicants appealed from so much of the judgment as decided that the defendants were entitled to make reasonable terminal charges in addition to the maximum rates for conveyance. Lord Halsbury gave judgment in these terms: "I confess if I had any difficulty about this case, it would be to understand how it ever could have been contested. A railway company is carrying on a business divided into two classes of business. They are carrying by their trains from point to point; and they are carrying (by reason of the variety of goods they have to take and the places at which they have to be delivered) a quantity of goods which they deliver from the point at which the locomotive by which the things have been conveyed, stops. I can quite understand that, as a matter of fact, the analysis of these two different classes of business, and the services and accommodation rendered in respect of these two classes of business, may sometimes be very difficult indeed, especially one which I instanced just now—the question of shunting and the use of railway sidings, for the purpose, it may be, of facilitating what I may call locomotive railway business, and carriers' distribution business. I can very well imagine that a person who had to make that analysis with very great precision, might be in some difficulty to know how much to attribute to one, and how much to attribute to the other. But the principle seems to me to be as plain as anything can possibly be. They are

(1) 7 Ry. & Can. Traff. Cas. 156, 169.

permitted by law to carry on the business not only along their line, but also in connection with it, and as part of the same general undertaking by which they make profit—the business of distributing the goods which they so bring from distant points to the places where the different consignees intend that they shall be delivered. For that purpose they have to build stations, both for the receipt and for the despatch of goods which are so entrusted to them. For those the tolls of the railway proper would be obviously inadequate and improper; and that they are entitled to make charges in respect of those things seems to me to be as manifest as anything can be. If Messrs. Pickford or Messrs. Chaplin & Horne did it in times gone by, and the railway company have succeeded to the business, why are not they, who are now performing the same duties that Pickford and Chaplin & Horne performed, entitled to make the gains and profits that those firms made when those firms were carrying it on as an independent business of their own? The question of quantum—the question indeed of analysis in respect of particular and individual things, is not before us; that is for the Railway Commissioners, or for their officers to ascertain. But upon the question of principle, I cannot, for my own part, entertain the least doubt in the world that the decision in *Hall's Case* (1) was right, and that Mr. Justice Wills' judgment is right; and that, as I understand it, is the only question submitted to us. We have, fortunately for us, not to go into the analysis of these things. We simply have to pronounce, as a matter of law, whether these expenses, if they are proved to be, in the language of the instrument itself, attributable to carriers' accommodation for dealing with merchandise traffic as carriers, are to be attributable to carriers' services and so on—for shunting, locomotive power, horses, staff and so forth—carriers' services in the sense in which those words are distinguished from the ordinary course of propulsion by the railway from one point to another. If, as a matter of fact, they can be so distinguished—it seems to me that the railway company, in their character as distributing or forwarding

(1) 15 Q. B. D. 505.

C. A. 1920

FOSTER v. G.E.R. Co.

Lord Sterndale M.R.

carriers, are entitled to charge something. I am content with saying that the judgment of the Railway Commissioners, to my mind, is manifestly right, and ought to be affirmed." Fry L.J. (1) states the principle in the same way: "It appears to me to be plain that the Legislature intended to divide the entire gross business carried on by the railway company under the powers of this Act into business of two kinds—the one, that which would have been done by a carrier, if a carrier had been doing the business as well as the railway company, and the second, that which would have been performed by the railway company, if there had been a carrier as well as the company. It seems to me that there was a sort of hypothetical carrier, to whom you are to attribute a portion of the services rendered. Therefore, the first inquiry is this: Would these services have been rendered by that carrier if he had been there? If Pickford, or Chaplin & Horne, had been carrying on the business at this station of transmitting the goods for the traders, would they have done this work, or would the railway company have done it?" The reference to the depots or stations established by carriers such as Pickford & Co. or Chaplin & Horne is taken from the special case in *Hall* v. *London, Brighton and South Coast Ry. Co.* (2): "The company adduced evidence to the effect that in the early days of railway working there was a class of carriers of goods traffic (of which Pickford & Co. may be taken as a sample) intermediary between the railway companies and the public, who performed and charged for all or most of the services mentioned in para. 12 of this case, and also in several cases provided at their own expense the station accommodation needed for the purposes of their traffic. It was proved, however, that this course of dealing never was universal; that where it existed it began to be superseded by the modern practice many years ago, and that Pickford & Co. (the only specific case of which any evidence was given) ceased to act as carriers by railway on their own account, and have for many years been acting

(1) 7 Ry. & Can. Traff. Cas. 156, 174. (2) 15 Q. B. D. 505, 508.

as agents only." These cases do, in my opinion, show that conveyance for the purposes of charging does not necessarily extend to the point where the consignee can take delivery and that there may be a right to make additional charges for services which the carrier would have rendered in the second stage of the historical development described by Wills J. in *Hall* v. *London, Brighton & South Coast Ry. Co.* (1) It is true that the greater part of these judgments is concerned with the right to charge in respect of the accommodation provided by a terminal station, but they do extend to conveyance to private sidings and have been so applied in other cases. I think, therefore, that the judgment of the Commissioners in the sense in which I read it is too widely stated, and as that may have influenced their decision on the question of fact I think the case must be remitted to them. But when I come to deal with the direction which the plaintiffs ask us to give the Commissioners very different considerations arise.

The learned counsel for the defendants formulated the instruction for which he asked in two different ways, one general and one adapted to this particular case. In the former he asked for a direction that conveyance is confined to work for the performance of which it is reasonable to use the train engine; if this be adopted, it follows that any services rendered after the train engine ceases to be used are services to be charged for as rendered at or in connection with the sidings. The request for this direction is founded upon the case of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Pidcock & Co.* (2)

The second form in which the direction asked for was put in a particular application of this principle to the case before us as follows: Conveyance means that conveyance stops from the time, as far as inwards traffic is concerned, where the traffic is placed by the train engine into their No. 1 reception sidings.

In order to accede to a request for a direction in either form it is necessary to accept the former—that is to say, that conveyance for the purpose of charge stops at the

(1) 15 Q. B. D. 505, 508. (2) 10 Ry. & Can. Traff. Cas. 150.

C. A. 1920

FOSTER v. G.E.R. Co.

Lord Sterndale M.R.

point where it is reasonable to use the train engine as a proposition of law applicable to all cases. I am not prepared to accept it as such a proposition, and have some doubts whether the case of the *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Pidcock & Co.* (1) meant to lay it down as a general proposition; if it did I cannot agree with it. The reasonableness of stopping the services of the train engine at a certain point may arise from the arrangements made by the railway company for the transaction of their general business as a railway company, and not in any way from their character of carriers as distinguished from conveyers. If that be so, it seems to me that the conveyance rate would cover the transit up to the point at which the independent carrier, if there were one, would receive the goods, and that the haulage of them from the point where the train engine dropped the trucks to the point above mentioned for the purposes of the railway company would not be the subjects of charge. This seems to me to be in accordance with the judgment of Lord Halsbury in *Sowerby* v. *Great Northern Ry. Co.* (2), where he says: "We simply have to pronounce, as a matter of law, whether these expenses, if they are proved to be, in the language of the instrument itself, attributable to carriers' accommodation for dealing with merchandise traffic as carriers, are to be attributable to carriers' services, and so on—for shunting, locomotive power, horses, staff and so forth—carriers' services in the sense in which those words are distinguished from the ordinary course of propulsion by the railway from one point to another," and with Lord Esher's statement in the same case (3), where he says: "That would leave the only inquiry to be, whether the charges which are made are properly incidental to the duty of a carrier as distinguished from the rest of the business carried on by the railway company." I think the case of the *North Staffordshire Ry. Co.* v. *Salt Union* (4) points in the same direction, though the facts were different

(1) 10 Ry. & Can. Traff. Cas. 150.
(2) 7 Ry. & Can. Traff. Cas. 156, 170.
(3) Ibid. 172.
(4) 10 Ry. & Can. Traff. Cas. 161.

and the actual decision not in point. To take an instance, it was argued for the plaintiffs that the conveyance rate in this case covered at any rate the transit up to the defendants' goods sidings called the coalfield sidings, and that the haulage from the No. 1 reception siding to these goods sidings was done by a shunting engine for the convenience only of the railway company, and would never have formed a part of the services rendered by a carrier in old days. This is a question of fact, and I offer no opinion as to whether it is right or wrong, but it is an illustration of the contentions that may be raised.

I think this was probably in Lord Terrington's mind, and these expressions gave rise to my doubt whether he intended to lay down any rule of law.

I do not see my way to go beyond the rule laid down in *Sowerby* v. *Great Northern Ry. Co.* (1), which I think may be taken as shortly stated by Fry L.J.: "If Pickford, or Chaplin & Horne, had been carrying on the business at this station of transmitting the goods for the traders, would they have done this work, or would the railway company have done it?" It is not an easy question, because it involves the consideration of a state of things quite different from those at present existing, and one that has long passed away. It may even involve the consideration of whether the carriers would for their business have constructed a station with such complicated arrangements as those at present existing.

It seems to me the position is this: Conveyance for the purpose of rates is the same under the Act of 1891 as when the cases of *Hall* v. *London, Brighton and South Coast Ry. Co.* (2) and *Sowerby* v. *Great Northern Ry. Co.* (3) were decided; it may or may not coincide with the contractual conveyance, but it cannot be said, as a matter of law, that it does. The point at which it ends will be ascertained prima facie by the point at which the goods train detaches and deposits the trucks, but if they are so detached and deposited for the convenience of the railway company at a point short of that to which, as conveyers, they would have been bound to take

(1) 7 Ry. & Can. Traff. Cas. 156, 174.
(2) 15 Q. B. D. 505.
(3) 7 Ry. & Can. Traff. Cas. 156.

C. A. 1920

FOSTER v. G.E.R. Co.

Lord Sterndale M.R.

them for the purpose of delivery to a distributing carrier in times when such carriers existed, a charge cannot be made for the haulage between these two points. I think this applies to station traders as well as to private siding owners, though they, as using the station, are liable to terminal charges to which sidings owners are not liable.

I do not think that it offends against the principle laid down by Wills J., that conveyance charges must be such as can be measured by a mileage rate; there still is a point to which it is measured, though the ascertainment of the point may be more difficult. There is a separate and distinct point raised by the plaintiffs with regard to a charge for the use of trucks. As I understand it, the point is this. The use of trucks is included in the conveyance rate, but the defendants contend that the use so given ends when conveyance ends, and that the plaintiffs are liable to pay for the use of the trucks between that time and the time when a charge for demurrage would begin as for a service rendered in connection with the sidings. I think there is no foundation for this claim. It is admitted that there is no precedent for it, and I think it is ill-founded. The use of trucks paid for in the conveyance rate does not, in my opinion, end until a reasonable time has been afforded to the consignee to take delivery of his goods, and when that reasonable time has been exceeded demurrage begins. I think the judgment of the Commissioners was quite right on that point. I think it well to point out that in this case also we are dealing with a private siding owner and not with a trader who may use the terminal station during this time of taking delivery from the trucks. That point is not before us, and I have not considered it.

The result is that the case must be remitted to the Commissioners with the direction I have mentioned. It may not be much guide to them, but it is impossible to frame any formula which will apply to all cases.

The appellants must have their costs of the appeal, the costs of the first hearing to abide the result of the rehearing.

ATKIN L.J. read the following judgment: This is an appeal

from a decision of the Railway and Canal Commissioners on an application by Messrs. Foster Bros. under the Railway and Canal Traffic Act, 1894, s. 4. The applicants are owners of a private siding which connects with the respondents' railway at Cambridge station. They claim a rebate from the rate charged to them in respect that the railway company does not provide station accommodation. The respondents, by their answer, admit that they do not provide station accommodation, but allege that they render services at or in connection with the applicants' sidings at the applicants' request, and that they are entitled to charge the applicants for such services under s. 5 of their Rates and Charges Order Confirmation Act, 1891. Though by the section any difference arising under it has to be referred to arbitration, to an arbitrator appointed by the Board of Trade, yet the Commissioners may be appointed as arbitrators, and it has been the usual practice of the Commissioners where they have to adjudicate upon a claim for a rebate under the Act of 1894 to take into account the claims that might be made before them if appointed arbitrators under s. 5 of the Act of 1891. It is a convenient practice and has received judicial approval, and no objection was in this case, or in my opinion, could be, made to it.

The main question that arises is whether the company are entitled to charge for the haulage of the applicants' trucks to the applicants' sidings from the company's reception sidings, where they are, in the first instance, deposited after being detached from the goods train which hauls them to Cambridge station. The applicants say that such charge is contained in the rate for conveyance which the company are empowered to charge under s. 2 of the Schedule to their Act, alleging that conveyance continues until delivery at the applicants' siding: the company allege that the conveyance for which they are entitled to charge under this section ends at the reception siding, or, at any rate, at a point short of the applicants' sidings; and that for haulage from the point where conveyance ends to the sidings is a service rendered at the applicants' implied request.

C. A. 1920

FOSTER v. G.E.R. CO.

Atkin L.J.

It was contended before us that this dispute raises only a question of fact, in which case we should have no jurisdiction. I have no doubt that this contention is ill founded, for the dispute involves questions of the construction of the company's Act of 1891 and of other railway Acts. Indeed, a very similar point has been before the Court of Appeal in *Sowerby* v. *Great Northern Ry. Co.* (1) It would be impossible for any tribunal to determine the issue raised between these parties without determining the extent of the legal obligations imposed upon the railway company by s. 2 of the Schedule to their Act of 1891, fixing the maximum rate which they may charge for "conveyance." The judgment of the Commissioners makes it plain that they took this view. They construed the word "conveyance," fortifying themselves by the authority of a previous decision in their Court, and in accordance with the view they took they disallowed this head of the company's claim. What, then, is the meaning of "conveyance" as used in the section in question? If the word was used in reference to an ordinary contract of carriage by an ordinary carrier without any proof of special trade usage I should have little doubt that it indicated an obligation to transport from the designated point of acceptance for carriage to the designated point of delivery; and in this particular case there was no dispute that the legal obligation of the railway company, under its agreement with the applicants, was to transport or haul or convey (in its ordinary sense) the trucks to the applicants' siding. But the question still remains, whether the rate allowed in s. 2 is intended to be the remuneration for performing the whole of that duty? It appears to me that we are bound by a current of authority to recognize that "conveyance" used in connection with railway rates and charges has a special and limited meaning. I do not propose to read the judgment of Wills J. in *Hall* v. *London, Brighton and South Coast Ry. Co.* (2) The historical survey which he took in that case of the development of railway trade and railway legislation was based upon evidence which had been placed before the Railway Commissioners

(1) 7 Ry. & Can. Traff. Cas. 156. (2) 15 Q. B. D. 505.

in the particular case, and had been made available to the public at large a few years before in the report of the Select Committee on Railway Rates of 1882. In 1888, two years after the judgment in *Hall's Case* (1), the Railway and Canal Traffic Act, 1888, was passed, by s. 24 of which the railway companies were directed to submit to the Board of Trade revised classifications of merchandize traffic and revised schedules of maximum rates and charges applicable thereto, with the object of their being eventually submitted to Parliament and embodied in an Act of Parliament. This procedure was carried out, and resulted in the uniform classification and to a less extent uniform rates to be found in the various railway companies Rates and Charges Order Confirmation Acts of 1891, including the Great Eastern Company's Act in question. It is, to the last degree, improbable that after the judgment in *Hall's Case* (1) the various companies would have prepared their schedules of rates upon any footing other than that laid down in that case, or that the Legislature would have used words in a sense inconsistent with the judgment in that case without express provision to that effect. In 1890 the same question arose in *Sowerby* v. *Great Northern Ry. Co.* (2), which was taken to the Court of Appeal. The Court of Appeal treated the question before them as being substantially whether the decision of Wills J. in *Hall's Case* (1) was right, and came to the conclusion that it was. The principle affirmed appears to me to be that in construing an Act giving powers to a railway company to charge for conveyance you are to remember that at one time railway companies acted only in the capacity of persons owning something analogous to a highway, and in that capacity were entitled to charge only for the haulage of vehicles upon that highway, leaving to independent carriers at the carriers' station the further duties that had to be performed before the vehicle was placed at the disposal of the consignee—namely, shunting, marshalling, checking, weighing, etc. At what precise point the conveyance by the railway company ends is not in terms decided. We

(1) 15 Q. B. D. 505. (2) 7 Ry. & Can. Traff. Cas. 156.

C. A. 1920

FOSTER v. G.E.R. CO.

Atkin L.J.

have, however, the guidance of Wills J. and of Lord Halsbury. Wills J. says in *Hall's Case* (1): "The charges of and incidental to 'conveyance,' as we have explained that phrase, are properly measured by the mile of distance travelled over"; and later on (2) he continues: "the line we should draw being that whatever is necessary for 'conveyance' in the sense in which we have defined it—being all capable of being measured by reference to the distance travelled—is covered by the mileage rate." Lord Halsbury says in *Sowerby's Case* (3): "I confess if I had any difficulty about this case, it would be to understand how it ever could have been contested. A railway company is carrying on a business divided into two classes of business. They are carrying by their trains from point to point; and they are carrying (by reason of the variety of goods they have to take and the places at which they have to be delivered) a quantity of goods which they deliver from the point at which the locomotive by which the things have been conveyed, stops." *Sowerby's Case* (3), though decided in the Court of Appeal in 1891, was not a decision upon the new statutory provisions of that year, but in 1896 the question arose between the owners of a private siding and a railway company under the Manchester, Sheffield and Lincolnshire Railway Company's Rates and Charges (No. 12) Order Confirmation Act, 1892: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Pidcock & Co.* (4) There the judgment was delivered by Sir Frederick Peel, who, it may be noted, had taken the contrary view to that finally adopted both in *Hall's Case* (1) and *Sowerby's Case* (3), but now was loyally accepting the view of the Court of Appeal expressed in the latter case. I need not refer to the facts, which are very similar to the present case. It is sufficient to say that the railway company's claim under s. 5 of the schedule to their Act was for services rendered in hauling trucks from their reception sidings to the respondents' private

(1) 15 Q. B. D. 505, 539.
(2) Ibid. 540.
(3) 7 Ry. & Can. Traff. Cas. 156, 169.
(4) 10 Ry. & Can. Traff. Cas. 150.

siding. Sir Frederick Peel said (1): "Now the question we have to determine depends, I think, not so much upon where in a general or common law view of a carrier's duties conveyance ceases in a contract of carriage, as upon the meaning the word 'conveyance' bears as used in the Railway Companies Rates and Charges Order Confirmation Acts, and the services to which the charges authorized by those Acts are respectively applicable. And, first, the conveyance rate authorized by s. 2 is the rate a company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not otherwise provided for. The rate, therefore, is for conveyance by merchandise train, and this will include any work which is incidental to such conveyance and for the performance of which it is reasonable to use the train engine, as for example, when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require." This judgment was concurred in by Collins J. The same construction of the scope of the conveyance rate was adopted in *Cowan & Sons* v. *North British Ry. Co.* (2), a judgment delivered by Sir F. Peel and concurred in by Lord Trayner, and in *Vickers, Sons & Maxim* v. *Midland Ry. Co.* (3) In the latter case Sir F. Peel said: "The matter seems to turn upon whether the train by which the sidings traffic arrives conveys it as near to its destination as such a train on this particular portion of line can be reasonably expected to come and deposits it for delivery at the point best fitted for that purpose." Wright J. did not differ from this judgment, and on appeal the Court of Appeal treated the dispute before them as one of fact, a view they could hardly have taken

(1) 10 Ry. & Can. Traff. Cas. 150, 157.
(2) 10 Ry. & Can. Traff. Cas. 169.
(3) 11 Ry. & Can. Traff. Cas. 249, 254.

C. A. 1920

FOSTER v. G.E.R. Co.

Atkin L.J.

had they been dissatisfied with the construction of the Act placed upon it by the Commissioners. I think that the result of these cases is that the determination of the extent of the "conveyance" rate involves questions both of law and fact. Applying the words of Lord Halsbury in *Sowerby's Case* (1), the railway company "are carrying by their trains from point to point," one has to determine to what point. The goods must be conveyed to the station or place (used in a wide sense) where the unloading takes place, and the conveyance rate covers at least so much of the transit as is completed by the conveying train. The conveyance is for a transit which can appropriately be measured by a mileage rate. On the other hand it is not necessarily completed when the conveying train or the train locomotive ceases to haul. If *Pidcock's Case* (2) lays this down as a matter of law it is too narrow. As nearly as possible one must resolve the two functions of the railway company as conveyers and independent carriers, and without accurately reconstructing hypothetical stations for hypothetical independent carriers, determine at what stage the company cease to act as conveyers and receive the trucks at the station as carriers. The trucks must be placed clear of the running lines: they may have to be placed clear of sidings which are substantially in use as part of the running system. Subject to the adoption of the construction set out above in particular cases the question will be one of fact. The tribunal will bear in mind the weighty consideration that the rate is a mileage rate: on the other hand they will see that the company act reasonably, and not allow them to fix the conveyance terminus at a point far distant from the point of unloading when the conveying train could reasonably throw off the trucks approximately near the point; taking into account at the same time the ordinary methods of conducting the traffic at the particular station or place.

It by no means follows from what I have said that the company are necessarily entitled to charge for all the cost of dealing with the trucks after "conveyance" in the charging

(1) 7 Ry. & Can. Traff. Cas. 156, 169. (2) 10 Ry. & Can. Traff. Cas. 150.

sense has ceased. The applicants' trucks may be hauled up and down the company's sidings in order to facilitate the company's operations in dealing with either traffic for station traders or traffic that is going on to other stations. So far as the services are not reasonably necessary for the haulage of the applicants' trucks from the "conveyance" terminus to the private siding no charge can be made in respect of them. But for the reasonable haulage from the conveyance terminus to the private siding I think the railway company is entitled to charge. Inasmuch as the Commissioners have put a different construction upon the extent of the obligation in respect of the conveyance rate I think that the case must be remitted to them to determine the dispute in accordance with the construction adopted by this Court. Applying that construction they will determine, as a question of fact, where the "conveyance" ends in the circumstances of this particular case.

In my judgment we are bound to come to this conclusion by the decision of the Court of Appeal in *Sowerby's Case*. (1) But inasmuch as that decision was given before the Railway Companies Rates and Charges Order Confirmation Acts, 1891, came into force it may be as well to deal with the suggestion that in those Acts the word "conveyance" should be construed differently. I have already stated my view of the improbability of any change being contemplated. The safe and well-known rule of construction is to assume that the Legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them: per James L.J. in *Greaves* v. *Tofield*. (2) Further, I think that reference to the Act itself confirms this view. The conveyance rate is a rate for conveyance by merchandize train. It is a mileage rate. By s. 10 is calculated the mileage; no part of the railway may be included which may in respect of that merchandize be the subject of a charge for station terminal. In other words, in the case of traders using the railway company's own siding, the conveyance rate almost necessarily must be

(1) 7 Ry. & Can. Traff. Cas. 156. (2) 14 Ch. D. 563, 571.

C. A. 1920

FOSTER v. G.E.R. Co.

Atkin L.J.

calculated only to the point where the trucks leave the system of running lines. The reason is that the charge for the identical service rendered to the applicants is made to the station trader in the station terminal. I attach no importance to the fact that the railway company has provided the numerous lines and sidings for its own purposes so far as those lines and sidings form part of their carriers' station. In the present instance the railway company appear to have provided a large carriers' station for dealing in the most expeditious manner with the traffic at Cambridge station of which the applicants' traffic forms part. If the applicants chose to exercise their statutory right to connect their siding with an existing large station involving a substantial journey to their siding from the point at which the vehicles have ceased to be conveyed and have reached the carriers' station, I see no reason why they should not pay for it. At the present conveyance rate, calculated as it is in the present case, it is plain that the applicants pay nothing for the service claimed. If the view taken below were correct apparently all conveyance rates to private sidings where they do not connect direct with many lines would have to be measured over each yard of railroad reasonably travelled over to reach the siding points. The same rule would apply to station traders except in so far as they were protected by s. 10. This would appear to be an entirely new departure in fixing rates, it would introduce various inequalities in charges between different traders, and I do not think it was the intention of the Legislature.

I only desire to notice a closely reasoned argument of Mr. Miller that conveyance must end where station begins, and that as terminal station is defined to mean a station or place upon the railway at which a consignment of merchandize is loaded or unloaded before or after conveyance, here the station is the private siding, and therefore conveyance only ends at the private siding. I think that the cases cited are inconsistent with this view. The definition is not so much concerned with delimiting the word " station " as in defining what is meant by " terminal." Station or place must receive

the ordinary general meaning. If it were otherwise traders unloading at a railway siding would not fairly be charged with the bulk of the station terminal which by s. 3 is the charge for the use of the accommodation and duties undertaken "at the terminal station," for much of the accommodation and many of the duties would in fact not be provided at the siding itself.

It only remains to mention the contention of the company, that they are entitled to charge for the use of trucks by the applicants after the conveyance has ended. This is based upon the words of s. 2, which provides that the conveyance rate includes the provision of locomotive power and trucks by the company. Locomotive power they say only means locomotive power for conveyance by train, so the provision of trucks is only for the period during which they are conveyed by train. I think that this is fallacious. A locomotive can be changed; on the other hand it is contemplated by Messrs. Foster Brothers that goods shall remain in the same trucks until discharged by or on behalf of the consignees. The fact that where a trader provides his own trucks the only rebate allowed by the Act is from the conveyance rate and not the terminal; and the express provision made for charges for detention of trucks only after a reasonable period seems to support the view that this revolutionary contention is ill founded.

YOUNGER L.J. read the following judgment: The facts of this case have been very fully stated, while a complete description of Messrs. Foster Bros.' sidings, both pink and green, and of the Great Eastern Railway Company's station at Cambridge has been given in the judgment of the Commissioners. It is permissible, therefore, for me to proceed without further preface to discuss the substantial question of principle which, as appears by the judgments just delivered, is raised by the appeal, dealing with it for the sake of simplicity in terms of inward traffic only. The question is whether the conveyance, technically so called, of the respondents' inward traffic terminates at the siding points of their pink sidings,

C. A. 1920

FOSTER v. G.E.R. Co.

Younger L.J.

and not before, and whether the conveyance of the inward traffic of the traders using the Cambridge station terminates when it is placed in that position in Cambridge goods station where traders can, and do, take delivery of their goods, that is, at the coalfield sidings, and not before, as has been found by the Commissioners, or whether, as the railway company contend, the Commissioners ought, as matter of law, to have found that the conveyance, both of the respondents' and of the traders' inward traffic, terminates so soon as the trucks are detached from the train standing in the running road, and are shunted thence to the station reception sidings, the appropriate siding for the inward traffic from the south being the No. 1 blue siding, and that for inward traffic from the north being the back goods road siding. The Commissioners having found, as I have said, that the conveyance of the respondents' inward traffic terminates only at the siding points of their pink sidings have fixed for the respondents a rebate from the agreed station terminal which leaves to the railway company under the head of services rendered by them at or in connection with the respondents' sidings no allowance for the shunting of the respondents' traffic from the reception sidings to the siding points of their pink sidings, for that distance is not, as I understand, at present included in the tonnage proportion of the rate. The appellants, the railway company, complain of this, and their complaint raises the main question of principle discussed on the appeal.

The regularity of that discussion was objected to by Mr. Talbot, on behalf of the respondents, on the ground that the finding of the Commissioners was really one of fact in respect of which their decision is final. It appears, however, from the Commissioners' judgment that a conclusion of law is involved in their finding of fact; and, while I agree that had they announced that finding of fact—namely, a rebate of 3*d.* per ton—without giving their reasons for it, the finding would not have been open to review, still, their reasons being authentically given, and when given being found to involve a conclusion on a question of law, it follows, I think, that the order of the Commissioners is subject to

appeal to this Court: see *North Eastern Ry. Co.* v. *North British Ry. Co.* (1)

I proceed, therefore, to the consideration of the main question, premising that it became common ground between the parties that in fixing the place of termination of conveyance with reference to a tonnage rate made under the company's Rates and Charges Order, 1891, the principles of *Hall's Case* (2) and of *Sowerby's Case* (3), apart, of course, from express provision to the contrary, continue to be as applicable as they were to the interpretation of the earlier railway legislation, with reference to which they were actually enunciated. Indeed, Mr. Miller's very careful analysis of the Charges Order left little room for doubt that these decisions were before the draftsman of that ordinance in preparing it. And there is one feature common to both decisions which it seems to me very desirable to emphasize, and that is that the conveyance rate resulting from the dissection of the composite rate directed by each judgment was to be the company's remuneration for doing, with reference to modern conditions, all, and not merely some, of the things that it would have done when it was a conveyer only, that is, when it undertook to convey and no more, and it was assumed, and I should suppose rightly assumed, that when that service of conveyance was completed the merchandize would be at some part of the prescribed place of destination on the company's system where it could be taken over by the carrier to whom it was consigned. The contract supposed was, in other words, a self-sufficient contract to convey the goods to the carrier at their prescribed railway destination. They were not to be left in the air, or out of his reach, or brought to him in consideration of some further payment for some further service. Until the goods were at the prescribed place for the carrier to take them, the carrier was neither required nor entitled to interfere. Up to that point the service was that of the company as a conveyer ; it was paid for by the carrier to the company as such, and—in the subsequent legislation—by the

(1) (1897) 10 Ry. & Can. Traff. Cas. 82, 114.

(2) 15 Q. B. D. 505.

(3) 7 Ry. & Can. Traff. Cas. 156.

C. A. 1920

FOSTER v. G.E.R. Co.

Younger L.J.

tonnage or mileage rate, if I may so far paraphrase the words of Fry L.J. in *Sowerby's Case.* (1)

And this essential point is brought out, I cannot help thinking, very clearly in the judgments and formal order of the Court of Appeal in *Sowerby's Case.* (1) These show, as I think pointedly, in the case of an existing composite station like Cambridge what part of it would, prima facie, constitute the hypothetical station of the hypothetical carrier at which delivery was to be made by the railway company as conveyers under the hypothetical contract for which they were to be remunerated by the tonnage rate. It would be that part of the station which, in the words of Brett M.R., " was required for dealing with the company's merchandise traffic as carriers," a requirement very aptly given effect to by the alteration made by the Court of Appeal in the Commissioners' order with regard to shunting. For the order in *Sowerby's Case* (1), as altered by the Court of Appeal, required that the only shunting to be included in the carriers' or terminal charge was to be shunting attributable to the company's business of carriers : " over and above," again quoting the Master of the Rolls' words in his judgment, " what it would be if they were acting only as a railway company " ; that is to say, as I read these words, exclusive of all shunting necessary to bring the goods to the carriers' station, up to which point they were acting, and acting only, as a railway company, or conveyers.

Now the Commissioners in the present case have stated in their judgment that the coalfield sidings is, at Cambridge station, the place for delivery of merchandize consigned to that station, and coalfield sidings is, in their view, the place where conveyance of that merchandize ends. That finding, subject to one possible qualification to be mentioned later, appears to be reached in obedience to the principle underlying the decision in *Sowerby's Case* (1), and it is not the least formidable objection to the appellants' alternative places of destination under their hypothetical contracts of conveyance that while no delivery is practicable at either, No. 1 blue siding,

(1) 7 Ry. & Can. Traff. Cas. 156, 172, 173.

the place of suggested destination for inward traffic from the south, is actually between the running lines of the railway, and unapproachable by any carrier or consignee whatever. In these circumstances it is difficult, except on a question of fact, to formulate the ground on which the Commissioners' finding on this point could be successfully impeached if the question fell to be determined in accordance with the provisions of a statute in the terms of the Great Northern Railway Act which governed *Sowerby's Case* (1), and in my view, apart from the effect of s. 2, which I reserve for later consideration, the present Charges Order points at least as strongly in the same direction as did the earlier Act. It appears to me that the true effect of s. 3 of that Order, which provides, so far as is now material, that a station terminal is a charge which a company may make for duties undertaken by the company at the terminal station, and of s. 10, which provides that in calculating the distance along the railway for the purpose of the maximum charge for conveyance of merchandize the company shall not include any portion of their railway which may, in respect of that merchandize, be the subject of a charge for station terminal, and of s. 26, which defines a terminal station as "A station or place upon the railway at which a consignment of merchandize is loaded or unloaded before or after conveyance on the railway," read together, is that under the Order conveyance and the rate for conveyance cover everything up to the commencement of a station terminal which, in turn, is a charge for a service rendered at a terminal station which, again, is a station where merchandize is unloaded after conveyance; in other words, conveyance ends at the terminal station—the equivalent of the carriers' station of *Sowerby's Case* (1)—whatever that, in the particular instance, may be.

But the appellants reject that view for a special reason. They say, as I understand their contention, that inasmuch as neither the respondents' sidings—with which I will deal later—nor the coalfield sidings are so placed as that the trucks containing their merchandize can be directly

(1) 7 Ry. & Can. Traff. Cas. 156, 172, 173.

C. A. 1920

FOSTER v. G.E.R. Co.

Younger L.J.

deposited there by the train engine which has brought them, it results that the conveyance in each case is terminated when the trucks are deposited by that engine on the reception sidings referred to as being those most convenient. This, they say, is the effect of s. 2 of the Charges Order as interpreted, and in their view correctly interpreted, by the Commissioners, particularly in the two cases of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Pidcock & Co.* (1) and *Vickers, Sons & Maxim* v. *Midland Ry. Co.* (2) Now s. 2, so far as material for this purpose, is as follows: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train," and in *Pidcock's Case* (1), a case in many respects similar to the present, it was held: "That the tonnage rate authorized by s. 2 of the Schedule is for conveyance by merchandise train and any work incidental to such conveyance, and for the performance of which it is reasonable to use the train engine (e.g., when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require); but that conveyance other than this off the main line does not come within s. 2"; and also that the excepted conveyance might be charged to the siding owners under s. 5 of the Charges Order as being service performed at or in connection with the siding, even although it was a service which was involved in delivery, and which the trader could not himself perform.

Now Mr. Talbot contended very strongly that the Commissioners' finding in that case was no more than a finding of fact applicable to Retford, the station then in question, and it is true that there Messrs. Pidcock were, in every instance, advised of the arrival of their merchandize as it reached the company's reception siding, and that they, on receipt of such advice, sent to sample the grain

(1) 10 Ry. & Can. Traff. Cas. 150. (2) 11 Ry. & Can. Traff. Cas. 249.

in the wagons, and subsequently, if satisfied, instructed the railway company to have the wagons required shunted to their own siding. It would accordingly appear that on these facts the Commissioners might well have found that what happened at the reception siding amounted to an acceptance there of delivery after conveyance, in which case no question of principle would be involved in their conclusion. I cannot, however, discover that the Commissioners' judgment in any way turned upon that circumstance, and it is certainly phrased as if intended to deal with the problem before them as one of construction of the Charges Order. The judgment was delivered by Sir Frederick Peel, and the governing portion of it, I think, is contained in the passage which has been already read by Atkin L.J. and which I need not repeat. Now, as I read that passage, the view taken of s. 2 is that conveyance to be conveyance must be by merchandize train, and by the train engine of that train, and that any portion of the further transit more conveniently effected, say by a station engine, or even by horse power, is not an expense of conveyance. Mr. Talbot pointed out the extraordinary consequences of making conveyance in every case terminate in accordance with anything so arbitrary and accidental, something varying at every station, varying at different times at the same station, and I concur in his criticism. But, further, the effect of so construing s. 2 of the Charges Order is in this respect to introduce a very great modification under that Order into the Sowerby principle, at least as I understand it. For that construction of s. 2 seems necessarily to involve this, that haulage by the train engine throughout is an essential part of the service to be rendered under modern conditions for the conveyance rate, even if thereby the conveyer is relieved of the previously essential requirement that for his conveyance rate he must bring the merchandize to some part of his system at the place of destination where the carrier, or consignee, can receive it. This modification, to my mind, goes to the very root of the matter. It seems obvious that unless the requirement so dispensed with is observed the service of conveyance is of no

C. A. 1920

FOSTER v. G.E.R. CO.

Younger L.J.

utility at all to the consignee, and the continued maintenance of the distinction between conveyer's services and carrier's services becomes nothing more than an interesting, but quite meaningless, anachronism. It is therefore important to see whether the Commissioners' construction of s. 2 in *Pidcock's Case* (1) was correct. They apparently read the section as if the words " by merchandise train " were there as emphatic words contrasted with such things as the station engine, or the horse power to which reference has already been made. Now, in my judgment, that is not the true effect of the section. It seems that the true contrast there is between conveyance " by merchandise train " and conveyance by " passenger train," referred to in Part V. of the schedule, it being well known that under the Charges Order the company is not bound to carry by passenger train any merchandize other than perishable goods: see *Stone & Co.* v. *Midland Ry. Co.* (2); and the passage in the judgment immediately following also contains, as I venture to think, a view of the effect of *Hall's Case* (3), which does not make sufficient allowance for the observations in *Sowerby's Case* (4), to which Sir Frederick does not refer at all. Sir Frederick continues, at the end of the passage already read by the Lord Justice (5): " But conveyance other than this off the main line does not seem to come within s. 2; and, further, to hold otherwise would be giving the word ' conveyance ' a meaning beyond its ordinary sense in the language of railway Acts according to the decision in *Hall's Case* (3), where it was defined by the Divisional Court on appeal from this Court as comprehending such work only as in the early days of railways was performed by a railway company acting as conveyers only and not as carriers as well, and as was capable of being measured by a reference to distance travelled." I do not think the learned Commissioner could have used these observations in the sense he did had there been present to his mind the observations in

(1) 10 Ry. & Can. Traff. Cas. 150, 158.

(2) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

(3) 15 Q. B. D. 505.

(4) 7 Ry. & Can. Traff. Cas. 156.

(5) 10 Ry. & Can. Traff. Cas. 158.

Sowerby's Case (1) and the other provisions of the Charges Order to which I have already called attention in this judgment. However, if it be necessary, or permissible, there is no difficulty in measuring the actual shunting service now in question by reference to the distance travelled, and I ought, perhaps, to add here, in order to avoid any misconception, that the question whether, on the footing of the Commissioners' decision in the present case, if it stands, the railway company is entitled to make any, and, if so, what addition to the tonnage portion of the combined rate in respect of the distance covered by the excluded shunting, or some part of it, is not touched by that decision, and is in no way concluded by these proceedings. I must therefore express my view that the decision of the Commissioners in *Pidcock's Case* (2), if it is to be regarded as laying down a principle of law, is wrong, and contrary both to principle and authority.

In the later case of *Vickers, Sons & Maxim* v. *Midland Ry. Co.* (3), Sir Frederick Peel expressed similar views on the question of principle apparently not altogether concurred in by Lord Cobham, and not in terms alluded to by Wright J., whose attention was mainly directed to another aspect of the matter which does not arise here. These observations therefore carry the matter no further, and the conclusion of it all, to my mind, is that there is no valid general principle enunciated in *Pidcock's Case* (4), which impeaches the correctness of the conclusion at which the Commissioners have arrived here with reference to the coalfield sidings being for conveyance the terminus of Cambridge traffic.

Turning now to the Commissioners' decision as to the place where the conveyance of the respondents' own traffic terminates—namely, the siding points of their pink sidings—my own view would be, prima facie, that in substance and effect these sidings are the respondents' own carriers' or terminal station, at which, under the contract of conveyance, as I

(1) 7 Ry. & Can. Traff. Cas. 156.
(2) 10 Ry. & Can. Traff. Cas. 150, 158.
(3) 11 Ry. & Can. Traff. Cas. 249, 254.
(4) 10 Ry. & Can. Traff. Cas. 150.

C. A. 1920

FOSTER v. G.E.R. Co.

Younger L.J.

have already interpreted it, they are entitled to receive their merchandize. There is a marked analogy in this respect between the present case and that of *Crompton & Co.* v. *Lancashire and Yorkshire Ry. Co.* (1); and the conclusion arrived at by the Commissioners is, I think, here confirmed by the provisions of the sidings agreement between the company and the respondents of November 27, 1916, and particularly clause 5, which provides: "The haulage of trucks, wagons, and vans to and from the pink sidings from and to the premises of the [respondents] shall, during the continuance of this agreement be performed by and at the expense in all things of the [respondents], but the company shall perform all services necessary for delivering or receiving the trucks, wagons, and vans at the pink sidings"; the agreement, in fact, appearing to contemplate the termination of the conveyance at the point where, prima facie, it would, on general principles, be presumed to end, and that this is the normal place of termination of conveyance of sidings traffic is shown also by the case of *Birmingham Corporation* v. *Midland Ry. Co.* (2), to which I would add the observations of Wright J. in *North Staffordshire Ry. Co.* v. *Salt Union* (3), in which he clearly indicates his view that a company cannot "charge beyond the conveyance rate for anything done on their own lines which is properly incidental to delivery or collection of traffic to or from the sidings, no matter how much the cost and trouble may be increased by the inconvenience of the siding, or the nature of the traffic, unless the defects or inconvenience are such as to relieve the railway company from their duty to deliver and collect. The very existence of the siding implies in practice that the railway company must, in order to collect and deliver from or to the siding, do on their own lines something beyond the mere work of transit." Presumably, amongst other things, the learned judge had shunting in his mind.

(1) (1902) 11 Ry. & Can. Traff. Cas. 285.
(2) 14 Ry. & Can. Traff. Cas. 24, 36.
(3) 10 Ry. & Can. Traff. Cas. 161.

Now, in the present case no defect or inconvenience in the sidings is suggested, other than this, if it be such, that, like coalfield sidings, they are not directly connected with the running lines of the railway. We have not here a case in which the respondents' siding from its limited size, or its situation, does not of itself afford sufficient accommodation for the delivery or collection of its traffic, a case referred to by Wright J. in *North Staffordshire Ry. Co.* v. *Salt Union* (1), nor are there in the present instance any of the special circumstances of such a kind as were found in the *Birmingham Case* (2) to demand special treatment. There is in this case no feature of disadvantage or inconvenience, and the fact is alluded to by the Commissioners, beyond a certain additional burden imposed upon the railway company by the configuration of their own station, and the construction of their sidings there, inconveniences which, as Wright J. has said, if incident to the siding itself, ought to be disregarded, and which, as I must think should, a fortiori, be disregarded when they are incident to their own railway. I cannot think, therefore, that the Commissioners, in fixing this rebate, have acted upon any wrong principle.

But I agree that no principle in these matters is so rigid as that it is incapable of yielding to circumstances of fact arising in the particular case ; and it is the view of the Master of the Rolls that the Commissioners in the present case may not have thought so, and may not have considered the conditions at Cambridge station from that point of view. I therefore acquiesce in his view that the case should be remitted to them, and I am content that it should go with the direction indicated by him, although I doubt myself whether their present award is not in fact fully justified in the circumstances of the case.

Upon the second question of principle raised on the appeal—namely, the charge for provision of trucks before and after conveyance—I concur in, and have nothing to add to, the views expressed by my Lord and the Lord

(1) 10 Ry. & Can. Traff. Cas. 161. (2) 14 Ry. & Can. Traff. Cas. 24.

C. A. 1920

FOSTER v. G.E.R. Co.

Younger L.J.

Justice affirming the judgment of the Commissioners in that respect.

Appeal allowed an first point and dismissed on second and case remitted to Commissioners.

Solicitor for appellants : *T. Chew.*

Solicitors for respondents : *Parker, Garrett & Co., for Alexander Wilson & Cowie, Liverpool.*

W. I. C.

C. A. 1920

March 18, 19, 30.

[IN THE COURT OF APPEAL.]

PORT OF LONDON AUTHORITY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits—Port Authority—Trade or Business—Standard of Profits—Right of Appeal—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 40, *sub-s.* 2; *ss.* 43, 45, *sub-s.* 5—*Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68).

The Port of London Authority was appointed under the Port of London Act, 1908, for the improvement and better administration of the Port of London, with power to acquire and carry on the undertakings of the various dock companies previously carrying on business on the river Thames. Its revenue was derived from rents for dock space, tolls and other sources, including dues on ships entering the port. Its surplus revenue was applicable only for the benefit of the port:—

Held, that the Authority carried on a "trade or business" within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and was liable to be assessed to excess profits duty under that Act.

Mersey Docks and Harbour Board v. *Lucas* (1883) 8 App. Cas. 891 followed.

Decision of Rowlatt J. upon this point [1919] 2 K. B. 608 affirmed.

Under s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915: An appeal lies from a decision of the Commissioners of Inland Revenue under s. 40, sub-s. 2, of the same Act, that an assessment to excess profits duty shall be based on the profits standard and not upon the percentage standard.

Rex v. *Inland Revenue Commissioners* [1918] 1 K. B. 143, and *Williamson Film Printing Co.* v. *Inland Revenue Commissioners* [1918] 2 K. B. 720 distinguished.

Decision of Rowlatt J. upon this point [1919] 2 K. B. 608 reversed.

C. A.
1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

APPEAL from a decision of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. (1)

At a meeting of the Special Commissioners held on February 18, 1918, for the purpose of hearing appeals, the Port of London Authority, hereinafter called the appellants, appealed against assessments to excess profits duty in the sums of 93,055*l.* and 234,991*l.* for the accounting periods of one year to March 31, 1915, and one year to March 31, 1916, respectively, made upon them by the Commissioners of Inland Revenue under the provisions of Part III. of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89).

The appellants were appointed by the Port of London Act, 1908, with powers, which had been extended or modified by later Acts, to acquire and carry on the undertakings of the several dock companies which were at the date of the Act carrying on business on the river Thames in and near London.

The appellants had carried out the duties with which they had been entrusted for improving and administering the Port of London. They had taken over and carried on the undertakings of the dock companies and other undertakings for use in connection therewith. They were owners of docks, lands, buildings, railways, warehouses, an hotel and other works, which they managed and controlled. The only difference which existed between the manner in which the several concerns taken over by the appellants were now managed and controlled as compared with the management and control of the previous owners, was that the appellants could only own, manage and control them for the purposes of and in accordance with the Port of London Acts, whereas the former owners owned, managed and controlled them with a view to the making of profits.

The revenue of the appellants was derived from dues and rent, and from rates and charges for accommodation and services rendered, and other sources including tolls. Their receipts on revenue account were, by s. 21 of the Act of 1908,

(1) [1919] 2 K. B. 608.

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

to be applied in the payment of working and establishment expenses, the payment of interest on Port stock and loans, contributions to sinking or redemption funds, and the balance, if any, was applicable to such purposes for the benefit of the Port as the appellants might determine. The assessments appealed against were made upon the basis of the pre-war standard of the profits of the appellants derived from the businesses transferred to them from the dock companies, etc. The appellants applied to the respondents that the assessments might be based upon a percentage standard as provided by s. 40, sub-s. 2, of the Finance Act (No. 2), 1915, but the respondents, after duly considering the application, decided that it had not been shown to their satisfaction that the amount of the profits arising from the trade or business carried on by them on a profits standard was less than the percentage standard.

The appellants appealed against the assessments to the Special Commissioners, and it was contended by counsel on their behalf: (1.) that the appellants were not a body carrying on a trade or business within the meaning of the Finance (No. 2) Act, 1915, Part III.; (2.) that the appellants did not, and owing to their constitution could not, make any profits within the meaning of that Part of the Act, and that any surplus which might accrue to them in their revenue account was purely of a temporary and accidental nature, and was not profit; and (3.) that the appellants were entitled to be charged on the basis of a percentage standard in lieu of the pre-war standard of profits by reference to which the assessments appealed against had been made.

Counsel on behalf of the respondents opposed the first and second contentions of the appellants, and as regards the third contention took the preliminary objection that it was not open to the appellants in proceedings upon an appeal under s. 45, sub-s. 5, of the Act of 1915, to question the decision of the respondents as to the standard of profits under s. 40, sub-s. 2.

The Special Commissioners determined that the appellants were carrying on a trade or business, and made profits in

doing so, within the meaning of the Act, and that they (the Special Commissioners) had no authority to adjust the amount of the assessment by reference to a percentage standard.

Rowlatt J. held: (1.) that the Authority carried on a trade or business within the meaning of s. 39 of the Act, and was liable to be assessed to the duty; and (2.) that no appeal lay from the decision of the Commissioners that the assessment should be based upon the profits standard and not upon a percentage standard.

The Port Authority appealed.

Ryde K.C. and *Edwardes Jones* for the appellants. The Port Authority is not a body carrying on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, Part III. The Authority cannot, under its constitution, make any profits within the meaning of that Part of the Act.

In order to be liable to excess profits duty there must be profits earned which the person entitled to them can take for his own benefit. The duty has no application to a corporation established by statute to carry on an undertaking like this for the benefit of the community. There is a distinction between "profits" and "gains": *Paddington Burial Board* v. *Inland Revenue Commissioners* (1); *Glasgow Water Commissioners* v. *Solicitor of Inland Revenue.* (2) Throughout the Finance (No. 2) Act, 1915, Part III., the word "gains" is not used. Its exclusion was deliberate, and some meaning must be attributed to that exclusion.

A trade or business connotes the earning of profits. The corporation is a "concern" in the nature of a trade, and is chargeable to income tax under Sch. A, No. III., r. 3, but it is not a trade or business within s. 38, and therefore not within s. 39. The corporation does not trade as did the dock companies, because its surplus revenues are applicable for the benefit of the port.

Next it is submitted that an appeal lies from the

(1) (1884) 13 Q. B. D. 9. (2) (1875) 2 R. 708; 1 Tax Cas. 29.

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

Commissioners refusing to base the assessment on the percentage standard.

The words of s. 45, sub-s. 2, are quite general, and give a right of appeal to any person who is dissatisfied with the amount of any assessment made upon him. They override the proviso to s. 40, sub-s. 2.

If there are two possible constructions of ss. 40 and 45, one of which leads to an absurd result, the Court will adopt the other.

[LORD STERNDALE M.R. The Legislature have given the Commissioners the right to finally decide the question.]

Sect. 45 gives a right of appeal as to the amount of the assessment, but it is said that there is no appeal upon the vital question as to which standard is to be adopted. The effect of the Crown's contention is to give a right of appeal upon questions of arithmetical detail but not upon the question of principle.

That cannot have been the intention of Parliament, particularly in a taxing Act. Our construction does not make s. 40, sub-s. 2, conflict with s. 45. Here the Inland Revenue Commissioners are making a calculation to ascertain the amount of the tax. The right of appeal must extend to every step in the calculation. The sole question is how the capital of the Port Authority ought to be computed. The Crown seek to prevent our raising the question whether the Port stock should be treated as capital or not. If it be properly treated and the percentage standard be adopted then the Authority is under no liability to the tax at all: *Rex* v. *Inland Revenue Commissioners* (1); *Williamson Film Printing Co.* v. *Inland Revenue Commissioners.* (2) The taxpayer may appeal upon every question upon the determination of which the assessment is arrived at.

T. H. Parr (*Sir Gordon Hewart A.-G.* and *R. P. Hills* with him) for the Crown. It is unarguable that the Port Authority are not carrying on a business within s. 39. "Business" is a very wide term. It includes many things which are not trades or businesses. It excepts "offices or employments":

(1) [1918] 1 K. B. 143. (2) [1918] 2 K. B. 720.

Burt & Co. v. *Inland Revenue Commissioners* (1); *Radcliffe & Co.* v. *Inland Revenue Commissioners.* (2) The same principles must be applied to excess profits duty as are applied to income tax in *Mersey Docks and Harbour Board* v. *Lucas.* (3)

On the other point, the true effect of s. 40, sub-s. 2, read with s. 45, sub-s. 5, is this. The matter is left to the Commissioners to decide whether it is proved to their satisfaction that the amount of the percentage standard is higher or lower than the profits standard. The section must be read as it stands. If the subject can show to the satisfaction of the Commissioners that the percentage standard is the higher one then that is the standard to be adopted, but the Commissioners have finally decided that it is not.

[SCRUTTON L.J. If the percentage standard were adopted then the question of the capital of the Authority would be subject to appeal. Why should it be subject to appeal in one case and not in the other?]

Parliament has so enacted. It is only one instance of several matters which are left to the Commissioners. They are the assessing body. See Sch. IV., Part I., rr. 3, 5, 11; Part II., r. 3; Part III., r. 3.

Care has been taken by the Legislature to specially provide for a right of appeal where it is so intended.

Finance Act, 1916, s. 47, has been the subject of decision in *Northern Navigation Co.* v. *Inland Revenue Commissioners.* (4) The language is not the same, but it is another instance of the same thing.

A discretionary power is given to the Commissioners, and in the absence of express statutory provision giving a right to appeal it is submitted their decision is final. It is conceded by the Crown that there is a right to appeal against the assessment, but when the subject gets to the appellate tribunal he is not entitled to go behind the decision of the Commissioners in this particular matter.

(1) [1919] 2 K. B. 650.
(2) (1919) 89 L. J. (K. B.) 267.
(3) 8 App. Cas. 891.
(4) (1919) 56 S. L. R. 171.

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

[*Inland Revenue Commissioners* v. *Auld, Pemberton & Co.* (1) and *Grimes* v. *Lethem* (2) were also referred to.]

Ryde K.C. in reply.

Cur. adv. vult.

Mar. 29. LORD STERNDALE M.R. This appeal from Rowlatt J. raises two questions. First, whether the Port of London Authority carries on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act of 1915, so as to render them liable to excess profits duty, and, secondly, whether on an appeal to the Special Commissioners against the amount of an assessment it is open to the appellant to question the decision of the Commissioners of Inland Revenue that the pre-war standard of profits was to be taken on a profits and not on a percentage basis. On the first point I have no doubt that the decision of Mr. Justice Rowlatt was right. There may be some question as to why the Legislature should have thought fit to take a percentage of profits which, when earned, would be applied to public purposes, thereby perhaps in this case necessitating an increase in the charges of the Port of London Authority on shipping. Sect. 39, however, imposes this duty on all trades and businesses of any description carried on in the United Kingdom, with certain exceptions not applying to this case. It was admitted by the appellants that they were chargeable to income tax on their revenue, and that but for the provision obliging them to devote the surplus revenue to public purposes they would be liable to excess profits duty. The liability to income tax was established by the case of the *Mersey Docks and Harbour Board* v. *Lucas*. (3) It was, however, argued that they were not liable to excess profits duty, because that was chargeable on profits only while the Income Tax Acts used the words "profits and gains," and it was contended that revenue which the receiver could apply to his own purpose was a profit while revenue which he had to apply to public purposes was not a profit but only a gain,

(1) [1919] 2. R. I. 66. (2) (1898) 3 Tax Cas. 622.
(3) 8 App. Cas. 891.

and therefore not chargeable with excess profits duty. I asked the learned counsel who argued this point if he could refer me to any authority establishing this distinction between profit and gain, and he cited a passage from the *Mersey Docks and Harbour Board* v. *Lucas*. (1) That passage, however, so far from establishing the distinction, negatives it, for Lord Selborne expressly says that in the Act of Parliament "profits" and "gains" are equivalent terms, and I find that Phillimore J. in *Delage* v. *Nugget Polish Co.* (2) says: "I take the word 'gains' to be no larger than the word 'profits.'" The appeal on this ground must be dismissed.

The second question is quite different, and much more difficult. The assessment for excess profits duty is ascertained by deducting from the post-war profits ascertained according to the provisions of the Act the pre-war profit taken either on a profits or a percentage standard. The provisions on this head are contained in s. 40 of the Act, which is as follows: "The pre-war standard of profits for the purposes of this Part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer (in this Part of this Act referred to as the profits standard): Provided that if it is shown to the satisfaction of the Commissioners of Inland Revenue that that amount was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard." In this case the appellants claimed to have the percentage standard of pre-war profits applied to their assessment. The Commissioners, however, refused this claim on the ground that it was not shown to their satisfaction that the profits standard was less than the percentage standard, and applied the profits standard. It was stated that they arrived at this decision by excluding a large amount of what they ought to have included in the capital of the company. If this were done the inevitable result would be to reduce the annual sum obtained by applying the statutory percentage

(1) 8 App. Cas. 905. (2) (1905) 92 L. T. 683.

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

Lord Sterndale M.R.

to the capital in proportion to the amount of capital excluded. The appellants contended that if the capital were taken at its proper amount the percentage standard would exceed the profits standard. They appealed to the Special Commissioners under the provisions of s. 45, sub-s. 5, and those Commissioners held that they had no authority to adjust the amount of the assessment by reference to a percentage standard: in other words, they held that the decision of the Inland Revenue Commissioners on that point was conclusive and final, and was not open to review by them. It seems to me clear that it ought to be so open to review but it does not seem so clear that it is. I think it should be open to review, first, on this ground. An appeal is given against the amount of the assessment. One very important element in such an assessment is the basis on which it is made, and if the basis be wrong it is difficult to see how the amount of the assessment can be right. There are two possible bases for the assessment: post-war profits minus pre-war profits standard, and post-war profits minus pre-war percentage standard; and the first element the assessing authority has to determine is which is the basis to be adopted. When that is determined the amount of the pre-war and post-war profits have to be ascertained, the one deducted from the other and the assessment completed.

I can see no reason why on an appeal against the amount of the assessment the decision of the Inland Revenue Commissioners on what is only one element of their assessment, though a most important one, should be final any more than their decision upon the other elements of the amount of the pre-war and post-war profits. If they decide, as they have in this case, that the profits standard is to be applied, the amount found by them of pre-war profits can be challenged on appeal. If they apply the percentage standard and fix it too low because they improperly exclude capital which ought to be included, their finding can be questioned, and the amount to be deducted from the post-war profits increased. In each of these cases, therefore, their decision as to the amount of the profits standard and percentage standard is open to review. I can see no reason in principle why their

decision as to the amounts of these two standards should be final when it is made for the purpose of comparison of the two in order to determine the basis of the assessment but their decision as to the amount of the one they adopt open to review after they have adopted it. It is, as I have before pointed out, not the decision of an independent authority but only one of the elements at which the assessing authority has to arrive in order to fix the amount of the assessment, and should be open to review in the same manner as their other decisions which enable them to fix the amount.

The wording of the Act, however, makes the question not clear, and much stress was laid on the words "shown to the satisfaction of the Commissioners of Inland Revenue," which it was argued showed that their decision was to be final. Rowlatt J. was of this opinion, and referred to sections in this and other Acts where those or similar words were used in cases where an appeal did not appear to be intended. It was also pointed out in argument that in some cases a special appeal was given from the Commissioners; for example, s. 40, sub-s. 3, and s. 42. The reason probably for these special provisions is that the appeal there is given to a special body, the Board of Referees. I feel the force of these contentions, and therefore I think the power of questioning this decision is not so clear as on principle I consider the right to do so, but on the whole I think the appeal should be allowed. I do not agree with Rowlatt J. in considering this decision of the Commissioners a matter collateral to the assessment: I consider it the determining of a necessary element of the assessment; and if there be any doubt on the matter I think, as this is a taxing Act, it should be determined so as not to deprive the subject of a right which, in my opinion, on principle he ought to have.

I do not think this judgment is inconsistent with *Rex* v. *Inland Revenue Commissioners* (1) or *Williamson Film Printing Co.* v. *Inland Revenue Commissioners* (2), which were decided on different words contained in other sections.

I think the case should be remitted to the Special

(1) [1918] 1 K. B. 143. (2) [1918] 2 K. B. 720.

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

Commissioners to decide the amount of the assessment, including the question of whether the profits or the percentage standard is the right basis.

WARRINGTON L.J. Two questions are raised in this appeal: First, whether the appellants, the Port of London Authority, carry on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, so as to render them liable to excess profits duty; and, secondly, whether on appeal to Special Commissioners against the amount of the assessment made by the Inland Revenue Commissioners, the Special Commissioners have jurisdiction to adopt the percentage standard in lieu of the pre-war standard of profits where the Inland Revenue Commissioners have declined so to do.

Rowlatt J. has decided both questions against the Port of London Authority. On the first question I agree with the learned judge. After the decision of the House of Lords in the *Mersey Docks and Harbour Board* v. *Lucas* (1) the point is really unarguable; I am quite satisfied with the learned judge's judgment on this question, and do not propose to add anything of my own to what he has said.

The second question is more difficult. Part III. of the Finance (No. 2) Act, 1915, deals with excess profits duty which is levied on the excess of the profits of a post-war year over those of a pre-war year. The amount of this second element in the comparison is, in general, ascertained by reference to a pre-war standard of profits as defined by s. 40 of the Act. But it is provided in sub-s. 2 that "if it is shown to the satisfaction of the Commissioners of Inland Revenue that that amount"—that is, the pre-war standard of profits—" was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard." Directions are then given for ascertaining the necessary figures based on a fixed statutory percentage. The Second Part of the Fourth Schedule contains rules as to the computation of the profits of a pre-war trade year, and the Third Part of the same schedule contains rules

(1) 8 App. Cas. 891.

for the ascertainment of capital for the purposes of the percentage standard. Sect. 45 provides that the excess profits duty shall be assessed by the Commissioners of Inland Revenue, and sub-s. 5 is as follows: "Any person who is dissatisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue under this Part of this Act may (except in cases where a special right of appeal is given under this Part of this Act) appeal to the General Commissioners for the division in which he is assessed, or to the special Commissioners, and those Commissioners shall have power on any appeal, if they think fit, to summon witnesses and examine them upon oath."

In the present case the Commissioners of Inland Revenue were not satisfied that the amount as defined by the Act of the pre-war standard of profits was less than the percentage standard, and accordingly refused to adopt the last-mentioned standard.

The Authority appealed to the Special Commissioners, who held that they had no jurisdiction in the matter.

The case is not one in which a special right of appeal is given, and is therefore within the general provision giving a right to appeal against the amount of the assessment.

To my mind the real question is whether in the proviso to s. 40, sub-s. 2, the Commissioners are referred to in their capacity as the tribunal appointed to assess the amount of the duty, or as a public department entrusted with the duty of settling a collateral point for the purpose of such assessment. The learned judge has adopted the latter view, being that for which the Commissioners insist.

Inasmuch as the amount of the duty depends on the difference between two amounts which have to be ascertained, and one of which may be ascertained by reference to whichever of two standards is most favourable to the subject, the selection of the standard is obviously an important element in arriving at the amount of the duty. The decision of the Commissioners not to adopt the percentage standard may well result, and is said in the present case to have resulted from some error of principle in ascertaining the amount of capital on which

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

Warrington L.J.

the percentage is to be charged, and other decisions in the course of assessment may be given which may be erroneous, as—e.g., from miscalculation of profits, or even from mere arithmetical errors. It cannot be disputed that decisions of the latter class might be reviewed on appeal, and it seems strange that a decision by the same body affecting the whole principle of the assessment should be outside the jurisdiction of the appellate tribunal.

The true view is, in my opinion, that the expression "to the satisfaction of the Commissioners" means to the satisfaction of the tribunal entrusted with the duty of making the assessment. If this view of the construction of the Act is correct, then I think the decision on the matter in question is as much open to review as any other decision of the Commissioners. For the purposes of the assessment the correct amount of each of the elements of comparison has to be proved to their satisfaction, or they could not make the assessment, and no one disputes that their decision on such matters is open to appeal.

We have been referred to two cases in which it has been held that under r. 5 of Part II. of the Fourth Schedule a discretion is given to the Commissioners as such; they are *Rex* v. *Inland Revenue Commissioners* (1) and *Williamson Film Printing Co., Ld.* v. *Inland Revenue Commissioners.* (2)

I do not, by this judgment, intend to throw any doubt on the correctness of these decisions. The expressions there dealt with were quite different from those in the present case.

On the whole I am of opinion that the appeal should be allowed.

SCRUTTON L.J. This appeal by the Port of London Authority against an assessment to excess profits tax raises two points. The first is whether the Port of London Authority, which amongst other functions has purchased the undertakings of the various private dock undertakings which used to furnish accommodation for the trade of London, carries on a "trade or business" within s. 38 of the Finance

(1) [1918] 1 K. B. 143. (2) [1918] 2 K. B. 720.

Act of 1915 (5 & 6 Geo. 5, c. 62). One may be surprised to find public authorities included by the Legislature in the excess profits tax, but the words used are very wide. The profits assessed are those arising from " any trade or business of any description carried on in the United Kingdom " : s. 39. It is clear that private dock undertakings, though assessed under Sch. A. of the Income Tax Act, earn profits by a trade relating to lands : Income Tax Act, 1918, Sch. D, Case 1. It has been determined by the House of Lords in *Mersey Docks and Harbour Board* v. *Lucas* (1) that the fact that the profits of trade are appropriated to public purposes does not prevent their being assessable to income tax as profits of trade. Under these circumstances I can see no ground for arguing that the profits made by the Port of London Authority out of dues paid for accommodation provided, are not, within the Finance Act, profits arising out of a trade or business carried on in the United Kingdom. I agree with the judgment of Rowlatt J. on this point.

The second point is one of more difficulty, and arises because the Special Commissioners, from whose decision the appeal is brought, declined to consider an appeal of the Port of London Authority from a decision of the Income Tax Commissioners as to the principle on which the amount of excess profits should be ascertained. The excess profits to be taxed are the excess by which the profits of the accounting year exceed the pre-war standard of profits. This pre-war standard may be reached in two ways. First, the taxpayer at his option may select two of the last three pre-war years, and the average of the profits of these two years may be taken as the normal profits, the " profits standard," with which the profits of the war year are to be compared to obtain an excess. But if these normal profits are less than the sum which would be obtained by applying a percentage fixed by the statute to the capital employed at the end of the last pre-war year, calculated according to the rules in the Third Part of the Fourth Schedule of the Act, the taxpayer has a right to have the percentage standard, and not the profits standard, taken

(1) 8 App. Cas. 891.

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

Scrutton L.J.

as the datum line above which profits are "excess." This, however, is subject to the proviso that the Inland Revenue Commissioners are satisfied that the profits standard gives a less amount than the percentage standard. They were not satisfied in this case. The appellants allege that they were not satisfied because they misconstrued the rules for the ascertainment of capital, and excluded a certain amount of Port stock from capital which they should have included. The appellants desired to appeal on this point under s. 45, sub-s. 5, of the Act, which gives a right of appeal to the General Commissioners or Special Commissioners (except in cases where a special right of appeal is given) to every person dissatisfied with the amount of any assessment made on him by the Commissioners of Inland Revenue. The appellants say they are dissatisfied with the amount of the assessment made on them because it is calculated on the wrong principle, as their profits standard is less than their percentage standard if the latter is properly calculated, and they are therefore entitled to have the latter properly calculated, and applied to get the amount of the excess profits on which their assessment is based. The respondents reply that the question which standard should be applied is a matter to be decided by the Inland Revenue Commissioners, the assessing authority, without appeal. If they are not satisfied, no appeal lies, however wrong they may be in their calculations or in their construction of the Third Part of the Fourth Schedule. This contention of the respondents involves such startling consequences that I should be slow to accede to it unless compelled to do so by perfectly clear words. In the first place, the contention involves the result that a Government department, as an assessing authority, can fix the amount of tax to be recovered from a taxpayer without any appeal as to a vital part of the assessment. This is, in my experience, quite novel as a taxing principle, and contrary to the language of sub-s. 5 of s. 45.

Secondly, this supposed power of the assessing authority is, in its effect, given to protect the taxpayer and not to protect the revenue. The taxpayer says: "My percentage

standard is higher than the profits standard; I shall pay less if I adopt it, and I desire to adopt it." "No," say the Commissioners, "you are mistaken; you will pay more if you adopt it, for your percentage standard is really lower than your profits standard, and so to protect you against yourself we shall not allow you to adopt it. At any rate it is not clear to us that you are right, and we will not let you run the risk of paying more than you ought to." "But," says the taxpayer, "it is you who are mistaken; you have not calculated my percentage standard according to the rules in the Act, and I desire to appeal against your miscalculation." "You cannot," say the Commissioners; "our decision is final; we are the final judges of what is good for you, and even if we have made a mistake you cannot set us right. Meanwhile we insist on your paying what we think is less than you want to pay; and if we have made a mistake, and you are really asked to pay more than you ought to pay, you have no appeal."

This position seems to me so extraordinary and so devoid of any reason for its enactment that it would require the clearest words to make me believe that it was the intention of Parliament.

But, thirdly, the details are even more odd. If the percentage standard were adopted, and the Commissioners made a mistake in calculating the capital, there would clearly be an appeal against the amount of their assessment, which depends on the calculation of capital as one of its bases. But if, in calculating the capital, to see whether the profits standard is less than the percentage standard, the Commissioners make the same mistake, and therefore reject the percentage standard, there is to be no appeal, though their mistake affects the basis and amount of the whole assessment. If the post-war profit is 12,000*l.*, the profits standard 10,000*l.*, the percentage standard, correctly calculated, 13,000*l.*, but as incorrectly calculated by the Commissioners, 9000*l.*, the taxpayer asks to be assessed on the percentage standard which he believes, correctly ascertained, will give him no liability. "No," say the Commissioners, "the percentage standard, correctly calculated, will make you pay on 3000*l.*

C. A. 1920

PORT OF LONDON AUTHORITY v. INLAND REVENUE COMMISSIONERS.

Scrutton L.J.

profits (12,000*l.* minus 9000*l.*), we will only allow your assessment to be calculated on the profit standard by which you will be assessed on 2000*l.* (12,000*l.* minus 10,000*l.*)." "But," says the taxpayer, "you have calculated the percentage standard wrongly." "Our decision is final," say the Commissioners, "and the man who ought to pay nothing has to pay on 2000*l.* profit, without appeal," when, if the Commissioners were assessing on the percentage standard, there would be an undoubted appeal, and their error could be corrected.

It is to be noticed that in another section of the Act, s. 43, which deals with excess profits in mining, sub-s. 2 expressly gives an appeal against the decision of the Commissioners as to the way in which the pre-war standard is to be fixed, but gives it under the Finance Act, 1909–10. It is impossible to give any satisfactory reason why in this case there should be an appeal, but no appeal in the ordinary excess profits tax. The general principle of the Act seems to be to give an appeal as to the amount of assessment to the General or Special Commissioners, on both law and fact, and beyond them by special case on questions of law, unless a special mode of appeal is provided, as under the Finance Act, 1909–10. I do not think any light is thrown on the matter by decisions on different words, such as those in Sch. IV., Part I., r. 5, which obviously give a discretion to the Commissioners. The question seems to me to be whether the words used in s. 40, sub-s. 2, enabling the Commissioners to decide if a certain fact is proved, that a certain basis of assessment should be applied, are sufficiently clear to exclude from the right of appeal given by s. 45, sub-s. 5, that part of the assessment of amount which consists in finding facts leading to the adoption or rejection of that basis of assessment. It is to be observed that the matter which determines the basis of assessment is a fact, not an opinion; it is the result of a calculation according to the rules in the Schedule: Are the pre-war profits, calculated according to the Act, less than the percentage standard, calculated according to the Act? If they are, the percentage standard "shall be taken" as the basis of

assessment, not "shall, if the Commissioners think it fair or fit or reasonable, be taken." This question of fact is to be decided by the Commissioners on certain principles, and affects vitally the amount of the assessment. That the Act, instead of using the phrase "if the Commissioners decide that," or "if it is proved before the Commissioners," uses the phrase "if it is shown to the satisfaction of the Commissioners," does not seem to me enough to make their decision final in a case where no satisfactory reason can be given why their decision should be final, and on a point which, raised in another way—i.e., in an appeal on an assessment based on the percentage standard—would clearly be the subject of appeal. Their decision is one of fact by an assessing authority, vital to fix the amount of assessment, and as such seems to me under s. 45 a proper subject of appeal.

For these reasons I am of opinion that the decision of Rowlatt J. and the Special Commissioners on this point was erroneous, and that the case should be remitted to the Special Commissioners on this point, to hear the appeal and decide what is the proper basis of assessment, and whether the percentage standard, properly calculated, is really not greater than the profit standard.

Solicitors for appellants : *E. F. Turner.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

G. A. S.

1920
April 23.

THE KING *v.* SUTER, *Ex parte* THE ATTORNEY-GENERAL.

THE KING *v.* CUMBERLAND JUSTICES AND SUTER, *Ex parte* THE ATTORNEY-GENERAL.

Criminal Law—Alleged Larceny—Person in Public Service—Information against Clerk in Public Service—Jurisdiction of Justices to Proceed summarily—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 12; *First Schedule—Larceny Act,* 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 17, *sub-s.* 1 (*a*); *sub-s.* 2 (*a*).

The Larceny Act, 1916, provides:—

Sect. 17: "Every person who—(1.) being a clerk or servant or person employed in the capacity of a clerk or servant—(*a*) steals any chattel, money, or valuable security belonging to or in the possession or power of his master or employer . . . .: (2.) being employed in the public service of His Majesty . . . . (*a*) steals any chattel, money, or valuable security belonging to or in the possession of His Majesty or entrusted to or received or taken into possession by such person by virtue of his employment . . . . shall be guilty of felony. . . . ."

An information laid against a clerk employed by the Ministry of Labour alleged that "you . . . . being a clerk employed in the public service of His Majesty . . . . did feloniously steal the sum of 5*l.* 16*s.* . . . . received into possession by you by virtue of your employment contrary to the Larceny Act, 1916, s. 17 (2.) (*a*)":—

Held, that the information charged the defendant with an offence under sub-s. 2 (*a*) of that section, and did not by reason merely of its describing him as a "clerk" charge him with an offence under sub-s. 1 (*a*); and, consequently, the offence charged not being that merely of larceny as a clerk or servant, that a Court of summary jurisdiction had no jurisdiction under the Summary Jurisdiction Act, 1879, s. 12, and First Schedule, to deal with the offence summarily, but must deal with it as an indictable offence.

Two rules nisi.

Albert Edward Suter was employed in clerical work by the Ministry of Labour at the Labour Exchange, Workington, Cumberland.

An information dated December 24, 1919, was laid against Suter, which so far as material was as follows: "To Albert Edward Suter of . . . . Workington, in the County of Cumberland, clerk. Information has been laid this day by George Charles Cooper of the Divisional Office, Ministry of Labour,

Newcastle-on-Tyne, in the County of Northumberland, Divisional Staff Officer, for that you on June 27, 1919, at the borough and parish of Workington . . . . then being a clerk employed in the public service of His Majesty at Workington . . . . did feloniously steal the sum of 5*l.* 16*s.* in money received into possession by you by virtue of your employment contrary to the Larceny Act, 1916, s. 17 (2.) (*a*) . . . . ." (1)

On January 7, 1920, the information was heard by justices or the county of Cumberland sitting at Workington. At the close of the evidence for the prosecution an application was made on behalf of the prosecutor to have the accused committed for trial at the assizes, and the justices retired to consider the matter. On returning to Court the justices asked the accused whether he wished to have the case dealt with summarily. He answered that he did, and pleaded "Not guilty." The justices then heard the case for the defence and again retired. On their return into Court it was announced that they were of opinion by a majority that there was not sufficient evidence to enable them to find the accused guilty, and that they dismissed the information.

On March 16, 1920, the Attorney-General obtained a rule absolute for a writ of certiorari to the justices to bring up their order; and also a rule nisi calling upon the justices and Suter to show cause why a writ of mandamus should not issue to the justices to hear and determine, pursuant to the statutes in that behalf, the matter of the said information, the grounds on which the rule was obtained being that the justices purported to hear and determine the information as a Court of summary jurisdiction, and that they ought to have dealt with it under the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 25. A writ of certiorari accordingly issued to the justices, and a return thereto was made by them. On March 23, 1920, the Attorney-General obtained a rule nisi calling upon Suter to show cause why the order of the justices dismissing the information should not be quashed.

(1) See note (2) on p. 632.

1920

THE KING v. SUTER, *Ex parte* THE ATTORNEY-GENERAL.

THE KING v. CUMBERLAND JUSTICES AND SUTER, *Ex parte* THE ATTORNEY-GENERAL.

On April 23, 1920, the two rules nisi came before the Court for argument.

Maddocks K.C. (*J. E. Murray-Smith* with him) showed cause.

The justices had jurisdiction to deal with the case summarily.

By the Summary Jurisdiction Act, 1879, s. 12, and First Schedule (1), as subsequently amended (1), a Court of summary jurisdiction may deal summarily with a charge of "larceny as a clerk or servant" where the value of the property does not exceed 20*l.*, if they think it expedient so to deal with the case and the defendant consents.

In the present case, although the information purports to charge the defendant with an offence under the Larceny Act, 1916, s. 17, sub-s. 2 (*a*) (2), namely, the offence of larceny by a person employed in the public service of His Majesty, yet it describes him as a "clerk," as he in fact was, and it thus, in effect, charges him with the offence of "larceny by a clerk or servant" under sub-s. 1 (*a*) (2) of that section; and the justices had therefore jurisdiction to deal with the case summarily under the provisions of the Act of 1879.

Even if the offence charged did not come under s. 17, sub-s. 1 (*a*), but only under sub-s. 2 (*a*) (2), the justices

(1) The Summary Jurisdiction Act, 1879, s. 12, and First Schedule, as amended by the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 15, sub-s. 1, provides that where a person who is an adult is charged before a Court of summary jurisdiction with, inter alia, "larceny as a clerk or servant," and the value of the property does not exceed £20, the Court, if they think it expedient, and if the person charged consents to be dealt with summarily, may deal summarily with the offence.

(2) Larceny Act, 1916.

Sect. 17: "Every person who—

(1.) being a clerk or servant or person employed in the capacity of a clerk or servant—

(*a*) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer; or

(*b*) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer:

(2.) being employed in the public service of His Majesty or in the police of any place whatsoever—

(*a*) steals any chattel, money

nevertheless had jurisdiction to deal with it summarily. Formerly the Larceny Act, 1861, dealt with these two offences in separate sections, s. 67 of that Act dealing with larceny by clerks and servants, and s. 69 with larceny by persons in the Queen's service, and it may be that while these sections remained in force only the offence under the former section, and not that under the latter section, could have been dealt with summarily. The Act of 1916 has, however, repealed these two sections, and in s. 17 it deals with both these offences together, treating them as closely related, and prescribing the same punishment for both. The marginal note to that section comprises both these offences together in the one common description of "Larceny . . . . by clerks and servants." It is therefore not unreasonable to conclude that the Legislature meant by the later enactment that both these offences should be placed upon the same level, and that as one of them was within the summary jurisdiction of the justices, the other ought also to be within that jurisdiction. In the absence of any express provision to that effect in the Act of 1916, it cannot be supposed that it was the intention of that Act that a clerk charged with larceny, who might have had the advantage of being tried in a summary manner if he had been in the employment of a private person, should be denied that advantage merely because he happens to be employed in the public service.

or valuable security belonging to or in the possession of His Majesty or entrusted to or received or taken into possession by such person by virtue of his employment; or

(*b*) embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money, or valuable security entrusted to or received or taken into possession by him by virtue of his employment:

. . . . . .

shall be guilty of felony. . . . ."

The marginal note to that section is: "Larceny and embezzlement by clerks or servants."

The Schedule to that Act repeals, and the above section supersedes, ss. 67, 68, 69 and 70 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which dealt respectively and separately with the offences of "Larceny by clerks and servants," "Embezzlement by clerks and servants," "Larceny by persons in the Queen's service . . . .," and "Embezzlement by persons in the Queen's service. . . . ."

1920

THE KING v. SUTER, *Ex parte* THE ATTORNEY-GENERAL.

THE KING v. CUMBERLAND JUSTICES AND SUTER, *Ex parte* THE ATTORNEY-GENERAL.

Sir Gordon Hewart K.C. and *Lilley* in support of the rules, were not called upon to argue.

EARL OF READING C.J. In my opinion these rules should be made absolute.

The sole question is whether or not the justices had jurisdiction to deal with the case summarily under s. 12 of the Summary Jurisdiction Act, 1879. The justices have jurisdiction to deal summarily with an offence under that section only if it is an offence specified in the second column of the First Schedule to that Act, and if the person charged with it consents that it be dealt with summarily. It is not suggested that the alleged offence in question is an offence specified in that schedule unless it be that of "larceny as a clerk or servant" within the meaning of the schedule. The information states that the person charged on a specified date he being "a clerk employed in the public service of His Majesty," stole certain money received into possession by him by virtue of his employment, contrary to the Larceny Act, 1916, s. 17, sub-s. 2 (*a*). It is said that that is a charge of larceny as a clerk, which could be dealt with summarily. The Act of 1916, under which the information was laid, is a consolidation Act which carefully distinguishes the various classes of the offence to which it relates. The meaning of the material clauses of s. 17 appears to me to be plain. Sub-sect. 1 (*a*) deals with the offence of larceny by a person being a clerk or servant or employed in the capacity of a clerk or servant. Sub-sect. 2 (*a*) deals with the offence of larceny by a person being employed in the public service of His Majesty. If an alleged offence falls within sub-s. 1 (*a*) the justices have jurisdiction to deal with it summarily; but if it falls within sub-s. 2 (*a*), then there can be no doubt that they have no jurisdiction so to deal with it even with the consent of the person charged. In the present case the offence alleged in the information is an offence under sub-s. 2 (*a*). The sole ground for the argument that it comes under sub-s. 1 (*a*) is that in the information the person charged is described as a clerk. The mere use of the word "clerk" does not, however, bring the

alleged offence within sub-s. 1 (*a*). In my opinion, the justices had no jurisdiction to deal with the case summarily. The rules should be made absolute to quash the order of the justices and for a writ of mandamus to them to hear and determine according to law.

1920

THE KING v. SUTER, *Ex parte* THE ATTORNEY-GENERAL.

THE KING v. CUMBERLAND JUSTICES AND SUTER, *Ex parte* THE ATTORNEY-GENERAL.

Earl of Reading C.J.

AVORY J. I am of the same opinion. The offence specified in sub-s. 1 (*a*) of s. 17 of the Act of 1916 is different from the offence specified in sub-s. 2 (*a*) of that section. The offence under sub-s. 1 (*a*) is committed by a person who, being an ordinary clerk or servant, steals any chattel or money belonging to, or in the possession of, his master or employer. The offence under sub-s. 2 (*a*) is committed by a person who, being employed in the public service of His Majesty, steals any chattel or money belonging to, or in the possession of His Majesty, "or entrusted to or received or taken into possession by such person by virtue of his employment." Thus a person cannot commit the offence under sub-s. 1 unless the chattel or money belongs to, or is in the possession of, his master; but he may commit the offence under sub-s. 2 not only where the chattel or money is in the possession or power of His Majesty, but also where it is in his own possession by virtue of his employment. In the present case the information charges the accused with the offence described in the second part of the latter clause, and it cannot be treated as charging him with the offence described in the former clause.

ROCHE J. I agree.

Rules absolute.

Solicitors: *Sayer, Ledgard & Smith, for Milburn & Co., Workington; the Solicitor to the Ministry of Labour.*

J. R.

1920
April 27.

ENGLAND *v.* INGLIS.

Municipal Corporation—Councillor—Interest in Contract with Council—Penalty—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 41.

By s. 12, sub-s. 1, of the Municipal Corporations Act, 1882, "a person shall be disqualified for being .... a councillor, if and while he ..... (*c*) Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council. ...."

Sect. 41, sub-s. 1, provides that "if any person acts in a corporate office .... after becoming disqualified, he shall for each offence be liable to a fine not exceeding fifty pounds, recoverable by action."

An "interest" in a contract within the meaning of s. 12, sub-s. 1, must be a pecuniary, or, at least, a material interest, but it need not be a pecuniary advantage.

The defendant, who was a member of a municipal corporation, carried on business as a jeweller and optician. The optical department was managed by his son, who was not a partner but a paid employee. A contract was made between the son, in his own name, and the municipal corporation for the supply of spectacles to the children of the schools controlled by the corporation's education committee. The contract was carried out by the son, the spectacles were paid for by him with his own cheque, and he received payment in his own name from the corporation and paid the amounts so received into his own banking account. The spectacles were supplied in cases bearing the son's name but the defendant's business address, some of the cases being taken at the expense of the defendant out of his stock. The son alone derived direct pecuniary benefit from the contract, but the shop was provided, and the establishment expenses paid, by the defendant, and the fact that the spectacle cases bore his address helped to advertise his business with the consequent probability of increasing his custom :—

Held, that on these facts the County Court judge was warranted in finding that the defendant had an "interest" in the contract within s. 12, sub-s. 1, and was liable to the penalty imposed by s. 41, sub-s. 1.

Appeal from York County Court.

The plaintiff sued to recover a penalty from the defendant under s. 41, sub-s. 1, of the Municipal Corporations Act, 1882, for having acted in a corporate office in the city of York on June 2, 1919, he being then disqualified under s. 12, sub-s. 1 (*c*), of the said Act by reason of being interested in a contract with the York Corporation.

The defendant was an alderman of the city of York, and

carried on business as a jeweller at 4, Coney Street, and as an optician at 6, Coney Street, trading as J. B. Inglis & Sons. The business at 6, Coney Street was managed by his son, Alexander Inglis, who was not a partner but a paid employee of his father. The contract in question in the action was one of a succession of similar contracts made in his own name between the son and the education committee of the city council for the supply of spectacles to the children of the schools controlled by the committee. In carrying out the contract the son attended at the school clinic, took instructions from the ophthalmic surgeon, ordered the spectacles from his father's wholesale dealers in London in his own name, paid for them by a cheque on his own banking account, received the corporation cheques in payment made out to himself, and paid them into his own account. The accounts were kept in a book of his own. The business was done from his father's shop and in his father's time; while the son was absent on military duty a female assistant was provided and paid for by the defendant; the spectacles were supplied in cases marked outside with the son's name, and with the address 4, Coney Street or 6, Coney Street, some being taken, at the defendant's expense, out of his stock.

The defendant denied that he had any interest in the contract in question. He said that it was made independently by his son, was executed by him alone, and that he, the son, alone obtained the profits therefrom.

The judge found that the contract, though in the name of the son, who alone derived direct pecuniary profit therefrom, seemed to have been inextricably mingled with the defendant's optical business; that it was partly paid for and carried out by the defendant who provided the shop and paid the establishment expenses; that if the son had had to pay the establishment expenses there would have been no profit; that the contract helped to advertise the defendant's business; that the defendant thus derived benefit in the shape of widespread advertisement and the probability of increased custom by reason of the parents of the children coming to his shop; and that he was thus interested in the contract within s. 12

1920

ENGLAND v. INGLIS.

of the Act. The judge accordingly gave judgment for the plaintiff for 50*l*.

The defendant appealed.

Richard Watson and *Vernon Wragge* for the defendant. The county court judge was wrong in holding that the defendant had an interest in the contract made between his son and the corporation's education committee. An "interest" within s. 12 of the Act must be a material interest; a mere sentimental interest, such as that of a father in the prosperity of his son, will not satisfy the section. The Court will not strain a penal section to bring cases within it where they do not come within the words of the enactment: *Le Feuvre* v. *Lankester*. (1) In that case an alderman of a borough sold iron to a person who had contracted to supply the council with iron railings and who purchased the iron in question for the purpose of performing his contract. It was held that the alderman had not an "interest" in the contract within the corresponding section of the Municipal Corporations Act, 1835. The same was held in *Norton* v. *Taylor* (2) on the corresponding provision of a colonial statute. There the facts pointed more strongly than they do here against the member of the council. It is said, however, that the defendant derived a benefit from the contract in the shape of an advertisement of his business with the consequent probability of increased custom. But the question of profit or advantage is not the determining factor; an "interest" in the contract must be shown before the defendant can be held liable to this penalty. The benefit of advertisement of his business is too remote to constitute an "interest." [They referred to *Laughton* v. *Port Erin Commissioners*. (3)]

T. R. D. Wright for the plaintiff. The object of enactments like that contained in s. 12 is to prevent the conflict between interest and duty that might otherwise inevitably arise: per Lindley L.J. in *Nutton* v. *Wilson*. (4) Such a conflict of duty might well arise in this case owing to the position of

(1) (1854) 3 E. & B. 530.
(2) [1906] A. C. 378.
(3) [1910] A. C. 565.
(4) (1889) 22 Q. B. D. 744, 748.

the defendant in relation to the contract in question, for supposing any complaints were made regarding the quality of the spectacles or cases supplied by the son, the matter might come before a committee of which the defendant was a member, and he might have to adjudicate upon goods, some of which he himself had supplied. Moreover the defendant had a reasonable expectation of a pecuniary advantage from the contract in the shape of advertisement. That is an "interest" within the section: see *Todd* v. *Robinson* (1) and *Barnacle* v. *Clark*. (2) In *Norton* v. *Taylor* (3), upon which reliance is placed for the defendant, there was no evidence of any probability of a profit and the interest suggested was considered too speculative and remote. That cannot be said in this case in view of the judge's findings.

Watson replied.

SALTER J. stated the facts and continued: In this case, where we are dealing with the case of a man who has no partners, s. 12, sub-s. 1, of the Municipal Corporations Act, 1882, disqualifies four classes of persons—those who have a direct share, those who have an indirect share, those who have a direct interest, and those who have an indirect interest in any contract or employment with a corporation.

The county court judge has found that the defendant had an interest in a contract with the York corporation, and that while having that interest he acted as an alderman of the city. As was pointed out by Lindley L.J. in *Nutton* v. *Wilson* (4) the object of sections of this kind is "to prevent the conflict between interest and duty that might otherwise inevitably arise." An "interest" within the meaning of the section must, I agree, be something more than a sentimental interest, such as arises from the natural love and affection of a man for his son; it must be a pecuniary or, at least, a material interest; but I do not see on what principle it must necessarily be a pecuniary advantage, because, if a public man is likely to suffer pecuniary loss by his interest

(1) (1884) 14 Q. B. D. 739.
(2) [1900] 1 Q. B. 279.
(3) [1906] A. C. 378.
(4) (1889) 22 Q. B. D. 744, 748.

1920

ENGLAND v. INGLIS.

Salter J.

in any particular contract, his judgment is as likely to be deflected as where he is obtaining a pecuniary advantage from it. In this case it is clear that, in some ways, the defendant sustained loss by the contract in question. The work was done in his shop; the establishment expenses were paid by him; the son made a small profit by the contract, but if he had had to pay the establishment expenses there would have been no profit; when the son was called up for military service the female assistant who took his place and performed his duties was provided and paid by the defendant; and lastly, in at least some instances the spectacle cases which the son had to provide under the contract were furnished at the expense of the defendant. In all these respects therefore the defendant had a pecuniary interest of an adverse kind in this contract. There was also evidence upon which the judge could properly find that the defendant had a pecuniary advantage, or a reasonable expectation of a pecuniary advantage, from the contract which may be summed up in the one word "advertisement." The spectacles, which were supplied on a considerable scale, went into the homes of the parents of the children, and the cases in which they were supplied bore the defendant's business address. That would be a valuable advertisement, and the natural business result would be that people would have recourse to the defendant's shop to buy spectacles and probably other things. That is the substance of the evidence and it supports the judgment. I do not consider it necessary to define precisely within which of the four categories I have mentioned the defendant should be placed; it is sufficient to say that the judge did not misapprehend the law and that there was evidence upon which he could properly find that the defendant had an interest in this contract. The appeal must be dismissed.

ROCHE J. I agree that the appeal should be dismissed. In substance, the statute with which we are concerned requires that a person shall not have an interest, direct or indirect, in a contract with a corporation of which he is a member. The judge has defined "interest" as follows: "The interest

required by the statute must, I think, be a pecuniary or material interest, not a mere sentimental interest such as that which a father may have in the prosperity of a son."

That definition, I think, is warranted by the authorities, and, in my opinion, the facts found bring this case within it. The evidence has been referred to in detail by Salter J. and I need not recapitulate it at length. In substance it was that a considerable portion of the expense of the contract was borne by the defendant and that the advantage reaped by the son was reaped by him in the defendant's time and when he was paid wages by the defendant; the lady assistant who took the son's place when he was called up for military service was paid by the defendant, who also provided the shop from which letters could be written and used as a business address. All this, as has been pointed out, is important with regard to the burden of the contract when one is considering the question of the defendant's interest in it. As to the benefit accruing to the defendant from its performance, the judge was, in my opinion, entitled to come to the conclusion that the burden was not sustained for nothing and that there was the possibility, and even probability, of an actual resulting benefit which has been summed up as useful advertisement. On these grounds I hold that not only did the judge not misdirect himself but that he had evidence which justified the conclusion at which he arrived. That is sufficient to dispose of the case.

Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for John Hague, York.*

Solicitors for defendant: *Ridsdale & Son, for Geo. Crombie & Sons, York.*

J. S. H.

1920
April 29.

STANTON *v.* SOUTHWICK.

Landlord and Tenant—Implied Condition—House reasonably fit for Human Habitation—House overrun with Rats—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 14, 15.

A landlord does not commit a breach of the condition that a house is reasonably fit for human habitation within the meaning of ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909, because it is from time to time invaded from without by rats in considerable numbers.

Semble per Salter (J.), there may be a breach of the condition implied by those sections if a house is infested with rats in the sense that they breed there, are regularly there, and, as it were, form part of the house.

APPEAL from Sheffield County Court.

The plaintiff, the tenant of a house in Sheffield let to him by the defendant, at a rent of 6*s.* 9*d.* per week, claimed damages for an alleged breach by the defendant of the implied condition, under ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909 (1), that the house was reasonably fit for human habitation.

The plaintiff entered into possession in August, 1917; he used part of the house as a provision shop, and the other part as a dwelling house. Soon after the letting the premises were found to be overrun with rats, which ate and destroyed goods in the shop and damaged the clothing of the plaintiff's wife and children. Complaint was made regarding this; the rat-holes in the cellar were blocked up, but the rats broke through again two days later; eventually, in August, 1919,

(1) Housing, Town Planning, &c., Act, 1909, s. 14: "In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding . . . . (*b*) in the case of a house situate in a borough or urban district with a population according to the last census for the time being of fifty thousand or upwards, 26*l.* . . . . there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation . . . ."

Sect. 15: "(1.) The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation."

the official rat-catcher was called in, and he succeeded in ridding the premises of the rats.

The judge found that the defendant's agent knew when the plaintiff took the premises that they were overrun with rats. He further found that the rats were sewer rats, which came from an old drain which ran under the premises in question and the adjoining houses.

On these facts the judge held, (1.) that the case was not one of an isolated invasion of a dwelling house by rats, but was a case of rats being almost continuously in the house, and that the defendant neglected to take proper steps to get rid of them; (2.) that the condition implied by the statute applied to the whole house, and that there was a breach of the condition if any of the rooms in it were rendered unfit for human habitation. He consequently decided that the dwelling house (in which term he included the shop and cellar) was not at the commencement of the holding, nor was it for some considerable time thereafter, reasonably fit for human habitation; and he gave judgment for the plaintiff for 33*l.* 11*s.* in respect of the damage done by the rats.

The defendant appealed.

Giveen and *Coddington* for the defendant. The decision of the county court judge is wrong both as regards the effect of the condition implied by ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909, and as regards the premises to which those sections are applicable. First, incursions of rats into a house are not within the scope of the sections. Rats are feræ naturæ, and the fact that they enter premises and do damage does not give rise to an action against the person from whose land they come: *Stearn* v. *Prentice Bros.* (1) It has been said that it is impossible to exclude rats from premises: *Carstairs* v. *Taylor.* (2) It may be suggested that as furnished houses infested with bugs—see *Smith* v. *Marrable* (3), *Campbell* v. *Lord Wenlock* (4), and *Jones* v. *Joseph* (5)

(1) [1919] 1 K. B. 394.
(2) (1871) L. R. 6 Ex. 217, 220.
(3) (1843) 11 M. & W. 5.
(4) (1866) 4 F. & F. 716.
(5) [1918] W. N. 52; 87 L. J. (K. B.) 510.

1920

STANTON v. SOUTHWICK.

—have been held not to be reasonably fit for habitation, the same should be held in reference to the house in this case. But in the cases cited the bugs could be said to form part of the premises, whereas the rats are an invasion from the sewer, attracted by the provisions in the shop. If the decision appealed from is upheld it involves this, that, if a factory adjoining a house sends out noxious fumes which enter the house, the landlord will be liable, although he can do nothing to abate the nuisance; so, too, he will be liable if there is a manure heap on the adjoining premises giving rise to a plague of flies many of which enter the house. The sections were never intended to apply to cases like these; their intention obviously was to impose upon the landlord an obligation like that imposed by a repairing covenant; they are concerned with something actually on the premises. [They also referred to *Dunster* v. *Hollis* (1) and the Rats and Mice (Destruction) Act, 1919 (9 & 10 Geo. 5, c. 72).]

Secondly, the county court judge wrongly treated the whole of the premises as a dwelling house. The Act is concerned only with premises qua dwelling house in the same way that the various Rent Restriction Acts are concerned only with dwelling houses: see *Wilcock* v. *Booth* (2); it is not dealing with premises used for trading purposes. No rats were found on the plaintiff's premises except in the cellar and shop; the part of the house used for habitation was therefore not affected.

[They also contended that several items of damage claimed were not recoverable, but as the Court found it unnecessary to deal with the question of damages, it is unnecessary to set out the argument upon it.]

Morle for the plaintiff. Upon the uncontradicted evidence given for the plaintiff the house was infested with rats, and the county court judge was entitled to come to the conclusion that the house was not reasonably fit for human habitation. *Smith* v. *Marrable* (3) is in point, and it follows from that decision that where a house is incumbered by a nuisance

(1) [1918] 2 K. B. 795. (2) [1920] W. N. 44.
(3) 11 M. & W. 5.

in the sense that no person could reasonably be expected to live in it, the sections apply. The case put by way of illustration of noxious fumes entering a house is not apt, inasmuch as there the nuisance is wholly from outside. Here the rats were actually on the premises.

Further, the sections apply to any premises let for habitation, and the fact that part is used as a shop is immaterial.

SALTER J. This is an appeal in an action in which the plaintiff, the tenant of a house, sued his landlord, claiming damages for alleged breaches by him of the condition and underaking implied by ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909. The plaintiff alleged that the defendant had failed to have the house in all respects reasonably fit for human habitation at the commencement of the holding, and failed to keep it during the holding reasonably fit for human habitation. The plaintiff's complaint was based on the presence of rats in the house from time to time in considerable numbers. The plaintiff kept a small provision shop on the ground floor of the premises in question; the previous tenant had a shop there of a similar kind, and the presence of provisions would attract rats if there were any in the neighbourhood. It was said that the house was infested with rats. If it had been proved that the house was infested with rats in the sense in which houses have been found to be infested with bugs, as was the case in *Smith* v. *Marrable* (1) and *Campbell* v. *Lord Wenlock* (2), it might be that that would constitute a breach by the landlord of the implied condition. In *Jones* v. *Joseph* (3) A. T. Lawrence and Atkin JJ. decided that for a tenant to leave the house infested with bugs was a breach of the covenant to leave it in as good a condition as that in which he took it. It is not necessary to decide the point, but it may be that if it had been shown that this house was infested with rats in the sense I have mentioned, the county court judge's decision might have been supported. Here the question is whether there was evidence on which the

(1) 11 M. & W. 5.
(2) 4 F. & F. 716.
(3) [1918] W. N. 52; 87 L. J. (K. B.) 510.

1920

STANTON v. SOUTHWICK.

Salter J.

judge could find that the house was infested with rats in the sense that they bred there, were regularly there and, as it were, formed part of the house. In my opinion there was no such evidence. The case was fought upon the footing that the rats had their home in the sewer passing below the house, that from the sewer they made incursions into the house in search of food, and that that was how they were found to be in the house. The judge was, in my view, wrong in law in holding that the presence in the house of the rats to that extent and in those conditions constituted or could constitute a breach of the statutory condition. The case of *Carstairs* v. *Taylor* (1) may be referred to in this connection. There the defendant let to the plaintiffs the lower part of a house as a warehouse, the defendant remaining in occupation of the upper part himself. A rat or rats gnawed a hole in a water cistern in the upper part of the house, and water poured down and caused damage to the plaintiffs' goods in the warehouse. It was plain that at that time the warehouse was not in a fit condition to be used as such. Mr. Benjamin, counsel for the plaintiffs, argued that "the defendant is liable on the ground of contract; he has impliedly undertaken that the warehouse let to the plaintiffs shall be suitable for the purpose for which it is let, which cannot be said to be true if it is accessible to water or to rats." Dealing with that argument Kelly C.B. said (2): "Clearly there is no duty on the occupier above, whether he be landlord or only occupier, to guard against an accident of this nature. It is absurd to suppose a duty on him to exclude the possibility of the entrance of rats from without. The case of a ship is totally different: it may be possible to insure freedom from rats in a vessel; but it is impossible to say with respect to warehouses generally that this can be done."

For the reasons I have given the judgment of the county court judge was wrong, and in the view I take it is unnecessary to express any opinion on the further points urged on behalf of the defendant—namely, that the house was not rendered uninhabitable by rats being in the shop,

(1) L. R. 6 Ex. 217. (2) Ibid. 220.

and that the damages claimed were too remote. The appeal will be allowed.

1920

STANTON v. SOUTHWICK.

ROCHE J. I agree that the appeal should be allowed on the ground that upon the evidence and the judge's findings there was nothing to warrant the conclusion that there was a breach of the condition implied by virtue of either s. 14 or s. 15 of the Act.

Appeal allowed.

Solicitors for plaintiff: *Church, Adams, Prior & Balmer, for Jackson & Jackson, Sheffield.*

Solicitors for defendant: *Ellis, Bickersteth, Aglionby & Hazel, for Claude Barker, Sheffield.*

J. S. H.

TENDRING UNION, APPELLANTS *v.* BRAINTREE UNION, RESPONDENTS.

1920
April 13.

Poor Law—Settlement—Legitimate Child under Sixteen—Residence of Father in another Union—Removability of Child—Poor Removal Act, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Illegitimate Children under Sixteen—Settlement—Settlement derived from Mother—Inquiry into derivative Settlement of Mother—Divided Parishes and Poor Law Amendment Act,* 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

The wife of A. C. P. left her husband who had been residing with her in a parish in the appellant union, and was settled therein, and went to live with another man in another union. In different parishes therein she gave birth to the paupers, three children, one legitimate and the others illegitimate. Eventually she and the children came to and resided for more than twelve months in the respondent union, when she deserted them, and they became chargeable to that union. The latter obtained an order adjudging the settlement of all three children to be in the above parish in the appellant union, all three being under sixteen years of age. The wife was never deserted by her husband:—

Held, as regards the legitimate child, that his settlement was that of his father in the above parish in the appellant union, his derivative settlement being preserved under the provisions of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, and that he was not irremovable from the respondent union under the provisions of the

1920

TENDRING UNION v. BRAINTREE UNION.

proviso to s. 1 of the Poor Removal Act, 1848, because his father, who had never resided in the respondent union, had, consequently, not acquired a status of irremovability therein.

Held, also, as regards the illegitimate children, that inasmuch as they took the settlement of their mother under the provisions of the second paragraph of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, which under the provisions of the first paragraph thereof remained derivatively that of the father, their place of settlement could not be shown without inquiring into the derivative settlement of the mother, and that, consequently, under the provisions of the third paragraph of s. 35 they must be deemed to be settled in the parish in which they were respectively born, neither of which was in the appellant union.

Dictum of Lord Watson (*Reigate Union* v. *Croydon Union* 14 App. Cas. 465, 484), that the third paragraph of s. 35 has no application to children under sixteen, disapproved.

CASE stated by Essex Justices under 12 & 13 Vict. c. 45, s. 11.

On April 9, 1918, the respondents, the Braintree Union, obtained an order from the above-mentioned justices adjudging that the parish of Dovercourt, in the appellants', the Tendring Union, was the place of the last legal settlement of George Ernest Douglas Potter, aged seven, Violet May Potter (otherwise Taylor), aged five, and Bertie Maurice Potter (otherwise Taylor), aged three, then chargeable to the Braintree Union. The appellants gave notice of appeal to quarter sessions against this order, and under an order of Sankey J. the following special case was stated under the provisions of the above Act.

Abraham Charles Potter and Edith May Potter were married on April 27, 1902, at Witham, in the Braintree Union. From April 28, 1902, until June 10, 1911, they resided together at Dovercourt in the Tendring Union, at which date A. C. Potter had acquired a settlement, by residence, for himself and his wife in that parish.

On June 10, 1911, Edith May Potter left her husband, and went with one Ernest Andrews to Writtle in the Chelmsford Union, where they lived and cohabited together until September, 1913. A. C. Potter, her husband, continued to reside at Dovercourt after June 10, 1911. He was not aware of his wife's intention to leave him, and had never deserted her.

On December 21, 1911, Edith May Potter gave birth at Writtle to a son, the above G. E. D. Potter, the legitimate child of A. C. Potter.

In September, 1913, Edith May Potter and Ernest Andrews left Writtle and went to Earl's Colne in the Halstead Union, where they lived and cohabited together until December 5, 1914, when they left and went to live at White Colne, in the same union.

On March 17, 1914, at Earl's Colne E. M. Potter gave birth to a daughter, the above Violet May Potter, and on May 4, 1915, at White Colne, she gave birth to a son, the above Bertie Maurice Potter. Violet May and Bertie Maurice were illegitimate children. All three children lived with their mother after the date when she left her husband or the dates of their births respectively.

On December 2, 1916, Edith May Potter with Andrews and the three children, went to live in Witham in the respondent Union, where she lived until December 3, 1918, when she, having been abandoned by Andrews some months previously, abandoned the children, and went to live with another man in a parish in the same union, and on December 17, 1918, the three children became chargeable to the respondent union.

Edith May Potter had not since June 10, 1911, when she left her husband, acquired any settlement in any parish in the respondent union, nor was she at any material time irremovable therefrom.

On April 9, 1918, the above order of the justices was obtained, adjudging the settlement of all three children to be in the parish of Dovercourt in the Tendring Union.

The Tendring Union appealed.

Cox-Sinclair for the appellants. The order of the justices was wrong. The cases of the legitimate child and of the illegitimate children give rise to different considerations. With regard to the legitimate child it is admitted that its settlement is in Dovercourt in the Tendring Union, because he takes the settlement of his father under the provisions

1920

TENDRING UNION v. BRAINTREE UNION.

of the first paragraph of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (1), and the father was settled in Dovercourt, as the case finds.

But although the son is settled in Dovercourt in the Tendring Union the order of the justices was bad, because under the provisions of the concluding portion of the proviso to s. 1 of the Poor Removal Act, 1848 (2), which is substituted for a corresponding proviso to s. 1 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), he was not removable from the Braintree Union, because his father, who had never resided there, was, in consequence, not removable therefrom. Alternatively the child was irremovable from Braintree Union because he had resided there for twelve months: s. 1 of the Poor Removal Act, 1846, as amended by s. 1 of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), as amended by s. 17 of the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113), which enact that no person shall be removed from a parish in which he shall have resided for one year under specified circumstances which existed in this case.

With regard to the illegitimate children the correctness

(1) Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) Poor Removal Act, 1848 (11 & 12 Vict. c. 111), s. 1: ". . . . Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act [the Poor Removal Act, 1846], and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act."

or otherwise of the order depends upon the interpretation of the third paragraph of s. 35 of the Act of 1876. (1) The contention of the respondents is that under the second paragraph of that section these children, being illegitimate, take the settlement of their mother, which was in Dovercourt, in the appellant union. But the wife only derived that settlement from her husband, the derivative settlement of a wife from her husband being one of the derivative settlements preserved under the first paragraph of the section ; therefore, in order to ascertain the settlement of the children, the derivative settlement of the wife must be inquired into, and that is the very mischief the third paragraph was intended to prevent. This point was taken during the argument in *Fulham Parish* v. *Woolwich Union* (2), but not decided, as it was held that the children in that case had gained a settlement of their own by residence. Therefore these illegitimate children must be deemed to be settled in the parishes in which they were born, neither of which is in the appellant union.

Again, the illegitimate children were also irremovable from the respondent union by virtue of s. 1 of the Poor Removal Act, 1846 (as amended) ; they had resided for more than twelve months therein, and although their mother was stated never to have been irremovable therefrom, then, if it should be contended that the status of the mother is to be looked at, their residence with her had ceased when they became chargeable on December 17, for she had abandoned them on December 3. Sect. 1 of the Poor Removal Act, 1846, therefore applies, and the children were irremovable though the mother was not.

C. E. Jones for the respondents. The order of the justices was right. With regard to the legitimate child it is admitted by the appellants that he is settled in their union, but it is said that he is not removable from the respondent's union because the father was said not to be removable therefrom, never having resided therein. But even assuming that the fact of non-residence would render the father not removable within the meaning of the proviso to s. 1 of the Act of 1848,

(1) See note ante, p. 650. (2) [1907] A. C. 255.

1920

TENDRING UNION v. BRAINTREE UNION.

which is not conceded, the proviso is not applicable to the facts of this case, for the Act was only intended to operate in order to prevent the splitting up of families, and this child had never resided with his father in the respondent union. On the contrary, to retain him in the Braintree Union would separate him from his father.

With regard to the illegitimate children, under the second paragraph of s. 35 of the Act of 1876, they take their mother's settlement until they acquire another settlement, which it is not suggested they have done here. The third paragraph, which is said to prevent this result, does not apply to children under sixteen years of age: per Lord Watson in *Reigate Union* v. *Croydon Union.* (1) But even if it does apply the prohibition against inquiry into derivative settlements does not relate to the derivative settlement of a wife but to derivative settlements of a more remote character—e.g., that of a grandparent.

Cox-Sinclair replied.

EARL OF READING C.J. This is an appeal from an order made by justices of the county of Essex adjudging the parish of Dovercourt in the Tendring Union to be the place of the last legal settlement of George Ernest Douglas Potter, Violet May Potter (otherwise Taylor), and Bertie Maurice Potter (otherwise Taylor), three children then chargeable to the Braintree Union. All three were under sixteen years of age, the eldest, G. E. D. Potter, being the legitimate child of A. C. Potter and E. M. Potter, the other two being the illegitimate children of E. M. Potter, who in 1911 left her home and went to a parish in the Chelmsford Union, living there with one Ernest Andrews. She cohabited with him, and the two illegitimate children above mentioned were born. The legitimate child was born in the Chelmsford Union and the two illegitimate children were born in the Halstead Union. On December 3, 1918, the three children were at Witham in the Braintree Union; on December 17 they became chargeable to the Braintree Union, and were handed over

1) 14 App. Cas. 484.

to the union authorities, and they were there until the order was made on April 9, 1919, adjudging that Dovercourt, in the Tendring Union, was their last place of settlement, when they were removed thither. The Tendring Union appeals from that order.

The law applicable to legitimate children differs from that applicable to illegitimate children, and must be dealt with separately. With regard to the legitimate child, G. E. D. Potter, what is said is that he had acquired a settlement from his father, A. C. Potter, under the provisions of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, and if that is so his settlement is rightly put in the Tendring Union, and no question can arise. But it is said that by virtue of s. 1 of the Poor Removal Act, 1848, and the proviso thereto, which is substituted for the proviso to s. 1 of the Poor Removal Act, 1846, we ought to hold that the child was irremovable from the Braintree Union because the father had acquired a status of irremovability therein. That point depends upon the view taken of the statutes and the facts.

It is clear that the justices have held that the mother was not irremovable from the Braintree Union, and it seems to me that the father had not acquired a status of irremovability from that union because he had never resided there. That is sufficient to decide the point as to the legitimate child. In my judgment there is nothing which can lead to any other view than that the settlement of this child was the settlement of his father, derived directly from the father himself, and no status of irremovability having been established, the result is that this child is settled in the Tendring Union, and the decision of the justices on this point was right.

With regard to the illegitimate children the whole question depends upon the construction of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, and particularly of the third paragraph. It must be remembered that the only question we have to determine is whether the justices were right in deciding that the two illegitimate children had a settlement in Dovercourt in the Tendring Union. If they

1920

TENDRING UNION v. BRAINTREE UNION.

Earl of Reading C. J.

had not we have not to decide in what parish or parishes they were settled. The third paragraph seems to have been based upon the second paragraph. [His Lordship read s. 35.] It is said that these two children, not having acquired another settlement, retained that of their mother in Dovercourt in the Tendring Union by virtue of the second paragraph. If s. 35 stopped at the end of the second paragraph that contention would be right. But there is the third paragraph, which applies both to legitimate and illegitimate children. Mr. Jones, for the respondents, did not contend that it does not, and it was the view held by the House of Lords in *West Ham Union* v. *Holbeach Union*, where Lord Macnaghten said (1): " 'The practical effect of the second clause of s. 35 is,' says Lord Watson, ' to place illegitimate, as nearly as may be, on the same footing with legitimate children,'" and " child," in the third paragraph clearly has the same meaning as " child " in the rest of the section. I think that the conditions contemplated by the third paragraph of s. 35 exist in this case, namely, that these illegitimate children have not acquired a settlement for themselves, and that it cannot be shown what settlement they have derived from the mother under the second paragraph without inquiring into the mother's derivative settlement from the father. Therefore the result is that they " shall be deemed to be settled " in the parishes in which they were respectively born, neither of which is in the appellant union. Consequently they are not settled in a parish in the Tendring Union, and the justices were wrong in holding that they were. It has been contended that so to construe the third paragraph is to adopt a construction repugnant to the first and second paragraphs. I cannot take that view. And I do not think the House of Lords ever intended to support the dictum of Lord Watson in *Reigate Union* v. *Croydon Union* (2) that the third paragraph has no application to children under sixteen. The decisions which have been given since that case in *West Ham Union* v. *Holbeach Union* (3) and *Woolwich Union* v. *Fulham Union* (4) are

(1) [1905] A. C. 453.
(2) 14 App. Cas. 484.
(3) [1905] A. C. 450.
(4) [1906] 2 K. B. 240.

inconsistent with that dictum. One cannot quite understand how it came to be uttered by Lord Watson, a most precise judge, and I cannot see any ground for adopting his view. It does violence to the language of the section, and I cannot think he ever intended it. The construction which I have placed upon the third paragraph is not inconsistent with the two preceding paragraphs. The law, as set out therein, applies unless the conditions mentioned in the third paragraph occur, when a new direction of law is given. (1) Therefore I have come to the conclusion that the justices were right as to the legitimate child, and wrong as to the two illegitimate children.

AVORY J. I agree. The order which is the subject of the appeal adjudges the place of settlement of these three children to be in Dovercourt, in the Tendring Union. It is clear that the justices made no distinction between the cases of the legitimate child and the illegitimate children. With regard to the legitimate child I think the order was right, because under the first paragraph of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, he took the settlement of the father and retained it until he acquired another, and it is not suggested that he had acquired any other settlement.

With regard to the illegitimate children I agree that the third paragraph of s. 35 applies to them. It is impossible to find the settlement of the illegitimate children without inquiring into the derivative settlement of the mother. Being illegitimate they took the settlement of the mother. The mother derived her settlement from her husband, and therefore in adjudging the settlement of these children to be in Dovercourt, in the Tendring Union, the justices have in fact inquired into the derivative settlement of the mother, which they are forbidden to do. I say nothing as to whether the illegitimate children were removable from the Braintree Union. It is clear that the legitimate child

(1) The attention of the Court was not drawn to the decision of the Court of Appeal in *West Derby Union* v. *Atcham Union* [1889] 24 Q. B. D. 117, which seems to be inconsistent with this part of the judgment. [Reporter's note.]

1920

TENDRING UNION v. BRAINTREE UNION.

AVORY J.

is removable, because his father if he were in Braintree Union would be removable therefrom, never having lived there, and therefore his legitimate child is also removable. I have only to add this with regard to the case of *Reigate Union* v. *Croydon Union*. My Lord has quoted a passage from the judgment of Lord Watson in that case where he says (1): "The provisions of the clause [the third clause of s. 35 of the Act of 1876] have, in my opinion, no application to children under the age of sixteen." There is no doubt that these words have given rise to considerable difficulty. It is to be observed that in that very same case Lord Macnaghten did not agree with that statement, because at the conclusion of his judgment, in dealing with one of the batch of cases then under appeal, he said (2): "In the case of *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* I agree with what was said in the judgment of the Court of Appeal as to s. 35. But I am unable to agree in their opinion that the residence of a child after sixteen cannot coalesce with its residence under sixteen so as to complete the period required for gaining a settlement."

In saying that it is clear he was not agreeing with Lord Watson's dictum. That view is confirmed by the House of Lords in *West Ham Union* v. *Holbeach Union*. (3) The point as to the settlement by residence of these children does not arise in this case because we have not to consider the question whether these children have acquired a settlement in a parish in the Braintree Union.

ROCHE J. I agree.

Appeal allowed in part.

Solicitors for appellants: *Morris & Bristow, for Ward, Hugh-Jones & Ward, Harwich.*

Solicitors for respondents: *Patersons, Snow & Co., for Holmes & Hills, Bocking.*

(1) 14 App. Cas. 484. (2) 14 App. Cas. 491.
(3) [1905] A. C. 450.

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1920
April 14, 15;
May 3.

COMMISSIONERS OF INLAND REVENUE *v.* BLOTT. SAME *v.* GREENWOOD.

Revenue—Income Tax—Super-tax—Assessment—Shareholder in Company—Bonus Shares—Income Tax, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 54, 163, 164, 165—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

An assessment to super-tax under the Finance (1909–10) Act, 1910, was made upon the respondent for a certain year in respect of an allotment to him of bonus shares in a limited company. In the previous year the company, having by its articles power to do so, had passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing in satisfaction of that bonus a distribution among the shareholders of certain of its unissued shares credited as fully paid up, and the respondent's said shares had been allotted to him in that previous year pursuant to that resolution :—

Held, that for the purposes of the super-tax the shares so allotted to the respondent could not be treated as part of his "total income from all sources for the previous year" within the meaning of s. 66, sub-s. 2, of the Act, inasmuch as they were not part of his income but were an addition to his capital in that year.

Swan Brewery Co. v. *The King* [1914] A. C. 231 distinguished.

Bouch v. *Sproule* (1887) 12 App. Cas. 385 applied.

Decision of Rowlatt J. [1920] 1 K. B. 114 affirmed.

Appeals from the decision of Rowlatt J. in two cases (1) stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Both cases raised the same question—namely, whether a shareholder in a company was assessable to super-tax upon an allotment of bonus shares issued by the company.

The facts of each case are fully stated in the report in the Court below, and also sufficiently appear from the written judgments of the Court of Appeal.

Rowlatt J. held that for the purposes of the super-tax the bonus shares could not be treated as income, but were an addition to the capital of the shareholder.

The Crown appealed.

Sir Gordon Hewart A.-G., Cunliffe K.C., T. H. Parr and

(1) [1920] 1 K. B. 114.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

R. P. Hills for the appellants. It is submitted that these bonus shares are really income and not capital. The question has not hitherto been raised in the case of an absolute owner, though it appears to have been decided as between tenant for life and remainderman in *Bouch* v. *Sproule* (1), where the authorities are collected. But that case affords little assistance here. It in effect decided that where the question arises as between tenant for life and remainderman under a will or settlement it is to be remembered that the testator or settlor must be deemed to know the constitution of the company in which he is interested and to have intended to leave it to the company to determine whether the undivided profits should be distributed as capital or income.

Bouch v. *Sproule* (1) is not of much assistance, because here the position is this : the company has funds for division, and decides to distribute them partly in cash and partly in fully paid shares. What really happens in the case of the shares is that the company notionally pays cash to the shareholder, who returns it to the company in consideration of the shares. That being so the liability to income tax attaches to the shares, for it is immaterial to what use the income is put by the taxpayer. When the shareholder's aliquot part of the divisible profits reaches him it is part of his " total income from all sources " : Finance (1909–10) Act, 1910, s. 66, sub-s. 2.

[*Brooks* v. *Inland Revenue Commissioners* (2); *Howe* v. *Inland Revenue Commissioners* (3); *Californian Copper Syndicate* v. *Harris* (4); and ss. 48, 54, 163, 164, 165, of the Income Tax Act, 1842, were also referred to.]

In *Tennant* v. *Smith* (5) Lord Halsbury said : " I come to the conclusion that the Act " (The Customs and Inland Revenue Act, 1876) " refers to money payments made to the person who receives them, though, of course, I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's

(1) 12 App. Cas. 385.
(2) [1914] 1 K. B. 579, 587 ; [1915] A. C. 478.
(3) [1919] 2 K. B. 336.
(4) (1904) 5 Tax Cas. 159.
(5) [1892] A. C. 150, 156.

worth and be therefore taxable." That applies to these bonus shares. The reasoning of Lord Sumner in *Swan Brewery Co.* v. *The King* (1) is directly applicable in this case.

Bouch v. *Sproule* (2) was successfully relied upon in the Court below, but the two cases are not at all in pari materia. The rule as between tenant for life and remainderman is highly artificial, and the intention of the testator or settlor has to be considered.

[They also referred to *Ashton Gas Co.* v. *Attorney-General* (3) and *Brooke* v. *Inland Revenue Commissioners.* (4)]

Sir John Simon K.C. and *A. M. Latter* for the respondent Blott. Three possible cases may happen when a trading company makes profits and pays income tax thereon. (1.) It may distribute the profits in the form of dividends. It is not disputed that in that case what the shareholder receives is income. (2.) The company makes the same profits and pays the same tax, but decides to keep the profits in reserve. No one can say that in that case the shareholder has received any income. (3.) Some day the company may decide to distribute a portion of the reserve to the shareholders, in which case what they receive is income. Or the company may resolve to capitalize the reserve by the issue of new fully paid shares, and it is said that the shareholder there receives income; but that is exactly what he does not do. The company, when it issues the shares, takes a step which it cannot alter, and what the shareholder receives is capital: *Bouch* v. *Sproule.* (2) The company's art. 109 in that case was in almost identical terms with art. 128 in *Blott's Case.* (5) It cannot be said that if nothing more had been done than to carry profits to reserve Blott would have been liable to tax. In what sense has his position been altered by turning the reserve into shares? If the question here arose between tenant for life and remainderman it is clear that the remainderman would be entitled to the shares, because they are capital and not income. [They also referred to *Johnston* v.

(1) [1914] A. C. 231.
(2) 12 App. Cas. 385.
(3) [1906] A. C. 10.
(4) [1918] 1 K. B. 257.
(5) [1920] 1 K. B. 116.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT.

SAME v. GREENWOOD.

Chestergate Hat Manufacturing Co. (1); *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2); *Samuel* v. *Inland Revenue Commissioners* (3); *In re Thomas* (4); and *In re Ogilvie.* (5)]

Clauson K.C. (*Sir John Simon K.C.* and *Bremner* with him) for the respondent Greenwood. It is common ground that in *Swan Brewery Co.* v. *The King* (6) *Bouch* v. *Sproule* (7) was not in question. All that was dealt with was the Colonial Act, in which "dividend" was defined as "every dividend, profit, advantage or gain," etc., so that whether income or capital the new shares were hit by the taxing Act. The reasoning of Lord Sumner in that case must be treated as applying to the matter then before him. He must not be taken as dissenting in any way from *Bouch* v. *Sproule.* (7)

[LORD STERNDALE M.R. Are not the bonus shares in the present case "money's worth" within *Tennant* v. *Smith* (8) ?]

It is submitted not. The Crown must show that what the shareholder has got is something in respect of which he is assessable to income tax. Assuming this to be an "advantage" within the Colonial Act in *Swan Brewery Co.* v. *The King* (6) it is nothing which the shareholder would be bound to include in his declaration on claiming exemption or abatement, because it is a purely capital benefit, and not income. The Crown cannot impose upon the shareholder a liability to include as part of his income the value of these bonus shares, by the issue of which the capital of the company is to be increased.

[SCRUTTON L.J. Suppose the company were distributing its assets in process of liquidation.]

What the shareholder would get in that case in respect of the shares would not be liable to the tax.

Cunliffe K.C. in reply referred to *In re Bridgewater Navigation Co.* (9)

Cur. adv. vult.

(1) [1915] 2 Ch. 338.
(2) (1913) 6 Tax Cas. 327.
(3) [1918] 2 K. B. 553.
(4) [1916] 2 Ch. 331.
(5) [1919] W. N. 32.
(6) [1914] A. C. 231.
(7) 12 App. Cas. 385.
(8) [1892] A. C. 150, 156.
(9) [1891] 2 Ch. 317, 327.

C. A.
1920
INLAND REVENUE COMMISSIONERS v. BLOTT.
SAME v. GREENWOOD.

May 3. LORD STERNDALE M.R. The facts of this case so far as it is necessary to state them are as follows. The respondent, Mr. Blott, is a shareholder in a company called Hepburn, Gale & Ross, Ld., which I shall call the Company, and the question to be decided is whether he is assessable to super-tax in respect of an allotment of what were called bonus shares in the company. The company had, by its articles, power to increase its capital and to distribute its profits in the usual way, including a distribution of paid-up shares in that or any other company. It had also the usual power to create reserve funds.

In the year 1914 the company had available for distribution, including a small carry-over, 61,903*l.* 1*s.* 3*d.* After carrying 10,000*l.* to the general reserve fund and paying a dividend on the preference and ordinary shares, a bonus of 33⅓ per cent. was, on the recommendation of the directors, declared, such bonus to be satisfied by the distribution amongst the shareholders of shares in the company credited as fully paid up. The actual report and resolution was as follows: "It will be appreciated while the company has heavy commitments which call for all its available capital it would be unwise to make any exceptional distribution; the directors therefore propose to pay the usual dividends of 5 per cent. on the First Preference Shares (of which 2½ per cent. has already been paid); of 6 per cent. on the Second Preference Shares (of which 3 per cent. has already been paid), and 10 per cent. on the Ordinary Shares, all less income tax. This will absorb 13,288*l.* 8*s.*, leaving 38,614*l.* 13*s.* 3*d.* In addition it is proposed to declare a further dividend to the ordinary shareholders to be satisfied by the allotment of one Second Preference Share fully paid for every three Ordinary Shares held by them, which will absorb 33,333*l.*, leaving 5281*l.* to be carried forward subject to the usual sums voted to the directors at the Annual Meeting."

The resolution by which that was carried out is in these terms: "resolved: That it is desirable to capitalise the sum of 33,333*l.* 6*s.* 8*d.*, being part of the undivided profits of the

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Lord Sterndale M.R.

company, and accordingly that a bonus at the rate of thirty-three and one-third per cent. per share free of income tax on each of the issued Ordinary Shares of the company be and the same is hereby declared, and that the directors be and they are hereby authorised to satisfy such bonus by the distribution among the members holding Ordinary Shares rateably of 33,316 of the unissued Second Preference Shares of 1*l.* each in the company credited as fully paid in satisfaction of such bonus."

It will be noticed that the resolution does not use the word "dividend" which occurs in the report, but I do not think much importance is to be attributed to that fact. The actual resolution calls it a "bonus."

A similar bonus was declared in respect of the profits of the year 1915, the only difference being in the amount of the profits and the number of shares.

By reason of these resolutions the respondent received, in respect of the years 1914–15, shares to the face value of 500*l.* and 750*l.* respectively.

The allotment of the shares was carried out by an agreement between the company and a Mr. Charles Walker on behalf of the shareholders.

The Crown sought to assess the respondent on the face value of the shares, and on the argument before Rowlatt J. and before us it was pointed out that there should be added to that face value the proportion of the income paid by the company on the profits before division. In fact, by such an allotment a shareholder does not receive the face value of the shares allotted. To take a simple case—if the capital of the company be doubled and the half newly created allotted to the shareholders the result is that the profits have to be divided amongst twice the amount of shares, and the benefit to the shareholder remains the same as before. Probably, in theory, the value of the shares originally held and those allotted would be half that of the former, but practically that is not always the case, and the value of the shares allotted depends not only upon the extent to which they participate in profits, but upon the prospects of the company and the state of the money market.

In *Bouch* v. *Sproule* (1), to which reference will be made later, it was stated that on the issue of 7*l.* 10*s.* shares fully paid the original shares fell 7*l.* I do not mention these facts merely to question the amount of the assessment but to show the principle upon which it proceeds—i.e., that the allotment of shares must be regarded as a cash payment of the face value of the shares, regarding as immaterial the fact that the shareholder never does receive any cash and can only obtain fully paid shares increasing the capital of the company and decreasing the participating value of the shares. In other words, the Crown contend that the respondent must be treated as if he had received the two sums of 500*l.* and 750*l.*, and had then been free to spend them as he liked in buying shares in this or another company, Government securities, or land or anything else, or not to invest them at all but spend them in his own amusements.

It seems to me that he is obviously not in fact in this position, and the question is whether he is to be considered to be so in law.

In my opinion it has been decided by the House of Lords in *Bouch* v. *Sproule* (1) that he is not. In that case bonus shares in a company were allotted in circumstances similar to those in this case. They were, as here stated, to be allotted as dividend, and the only difference in the circumstances was that in that case the shareholder had an option whether he would take the allotted shares or the dividend. This, however, was disregarded by the House of Lords, because although the shareholder had legally an option the circumstances of the case made it only a nominal one, for the shares were worth so much more than the dividend that there was no real option at all. The case, therefore, in my opinion, was indistinguishable in principle from the present. The House of Lords held that when a company has the power of distributing or capitalizing its profits, that company has the decision as to whether the shares issued shall be dividend or capital. This was also held by Neville J. in *In re Evans* (2) and in the Court of Appeal in *In re Thomas.* (3) Lord Herschell's

(1) 12 App. Cas. 385. (2) [1913] 1 Ch. 23. (3) [1916] 2 Ch. 331.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Lord Sterndale M.R.

words seem to me to be exactly applicable to this case. He said (1): "I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly created shares. And the form in which the operations were effected points in the same direction." Lord Watson also said (2): "I am unable to resist the conclusion that, in adopting the scheme recommended by the directors the company must have intended that each shareholder should get an allotment of new shares, and that the money declared to be payable as dividend, which was not in the coffers of the company and did not exist in a form available for distribution, should not be paid to the shareholder, but should simply, by means of an entry in the company's books, be imputed in payment of the call of 7*l.* 10*s.* upon each new share."

It was argued for the Crown that this decision turned upon the relationship of tenant for life and remainderman and was not of general application. It is true that the question in that case was whether the shares allotted belonged to the tenant for life or the remainderman, and the House of Lords, after holding them to be capital and not income, applied that decision to the rights of those parties, but I cannot see that their determination on that depended in any way on the relationship to which they had to apply it.

I have, however, felt great difficulty about *Swan Brewery Co.* v. *The King* (3), where Lord Sumner, delivering the judgment of Lord Moulton, Lord Parker of Waddington and himself, said that in a transaction similar to this the shares in ordinary language would not be called a dividend nor would the allotment of them be the distribution of a dividend, but in another part of his judgment, that both in business and in law the shareholder received so much dividend out of undivided profits, and then used it in paying up the new shares. The actual decision was upon the special words of a Colonial Act containing what Rowlatt J. calls a highly artificial

(1) 12 App. Cas. 399. (2) Ibid. 404.
(3) [1914] A. C. 231.

definition of the word "dividend," and the learned judge distinguished the case on that ground.

Lord Sumner also stated that the question turned merely on the construction of a particular Act, and the case may be distinguishable from *Bouch* v. *Sproule* (1) on that ground; but I find it very difficult to reconcile the reasoning of the two cases. If, however, they cannot be reconciled, I consider that we are bound to follow *Bouch* v. *Sproule*. (1)

I think the appeal should be dismissed with costs.

It is admitted that the second case, *Commissioners of Inland Revenue* v. *Greenwood*, is not distinguishable in principle from that just decided, and this appeal must also be dismissed with costs.

WARRINGTON L.J. The question in these two cases, *Inland Revenue Commissioners* v. *Blott* and *Inland Revenue Commissioners* v. *Greenwood*, is whether the respondents respectively are liable to be assessed to super-tax in sums equal to the nominal value of certain shares issued by way of bonus by companies of which they were respectively members.

I propose to state shortly the facts in *Blott's Case* and my view on the law applicable thereto.

The respondent, Blott, was, at the material times, a shareholder in Hepburn, Gale & Ross, Ld., which I will call the Company. I do not propose to repeat here the terms of the articles of association relevant to the question; it is enough to say that the action of the company and the directors hereinafter mentioned was in every respect within the authority of the articles.

The accounts of the company are made up to December 31 in each year. For the year ending December 31, 1914, the accounts showed a net profit (including 3051*l.* 10*s.* 5*d.* carried forward from the previous year) of 61,903*l.* 1*s.* 3*d.* Of this sum 10,000*l.* was carried to the credit of the general reserve fund and 13,288*l.* 8*s.* was distributed in dividends. In their report accompanying the accounts, the directors inserted a paragraph

(1) 12 App. Cas. 385.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Warrington L.J.

in which they say: "It will be appreciated, while the company has heavy commitments which call for all its available capital it would be unwise to make any exceptional distribution; the directors propose to pay the usual dividends," specifying them, and they proceed: "In addition it is proposed to declare a further dividend to the ordinary shareholders to be satisfied by the allotment of one Second Preference Share fully paid for every three Ordinary Shares held by them."

The directors thus express their intention of not making an exceptional distribution of profits but of using the profits over and above the amount of the usual distribution to increase their capital in view of the heavy commitments of the company.

The annual meeting of the company for the consideration of the report and the declaration of dividends, and so forth, was held on February 6, 1915. A declaration of the usual dividend was made as recommended by the directors, and the following resolution was then passed: "That it is desirable to capitalise the sum of 33,333*l.* 6*s.* 8*d.*, being part of the undivided profits of the company, and accordingly that a bonus at the rate of thirty-three and one-third per cent. per share free of income tax on each of the issued ordinary shares of the company be and the same is hereby declared, and that the directors be and they are hereby authorised to satisfy such bonus by the distribution among the members holding ordinary shares rateably of 33,316 of the unissued Second Preference Shares of 1*l.* each in the company credited as fully paid in satisfaction of such bonus." It will be seen that the resolution emphasizes the intention to capitalize the undivided profits, and substitutes the word "bonus" for the word "dividend" used in the directors' report.

By an agreement dated February 8, 1915, made between the company of the one part and a shareholder properly acting on behalf of himself and all other ordinary shareholders of the other part, and duly filed with the Registrar of Joint Stock Companies, it was agreed that the company should allot and issue the shares mentioned in the resolution, that they

should be credited as fully paid up, and should be accepted in satisfaction of the said bonus.

The respondent, Blott, duly received, prior to April 5, 1915, 500 1*l.* preference shares credited as fully paid up as his proportion of the bonus. Precisely the same thing happened in the next year, except that the profits were larger and 20 per cent. dividend was paid on the ordinary shares, and the bonus was at the rate of 50 per cent. instead of 33⅓ per cent. The respondent, before April 5, 1916, received an allotment of 750 second preference shares of 1*l.* each credited as fully paid in satisfaction of the bonus.

The Commissioners sought to include in his total income for the purposes of super-tax the sum of 500*l.* as income of the year ending April 5, 1915, and the sum of 750*l.* as income of the year ending April 5, 1916, treating those sums as dividends invested by the recipient in the second preference shares. To be logical, the Commissioners on their view of the position should have charged the respondent with an additional sum representing income tax, but they have not done so, and I do not think the omission alters the legal position.

These being the material facts, I now turn to the law. Super-tax was imposed for the first time by the Finance (1909–10) Act, 1910. The tax is charged in respect of the income of any individual the total of which from all sources exceeds a certain sum, and it is charged by the name and description of "an additional duty of income tax in this Act referred to as a super-tax." It is further provided that the total income from all sources shall be taken to be the total income from all sources for the year previous to the year of assessment estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. It is, I think, unnecessary to refer to the provisions of the last-mentioned Acts in any detail. For the purposes of both Acts it is income and income only which is brought into charge, and the Commissioners accordingly have to make out in the present case that the 500*l.* and 750*l.*

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Warrington L.J.

respectively are income of the year preceding the year of assessment.

The scheme of the Income Tax Acts with regard to companies and their shareholders is that the company is assessed on the total amount of its profits. This was done in the present case and the tax was paid, and the shareholder when paid his dividend is bound to allow thereout a proportionate deduction in respect of the duty so charged: see Income Tax Act, 1842, s. 54. For the purpose of exemption or abatement the claimant is required to make a declaration in the prescribed form of, amongst other things, the particular sources from which his income is derived and the particular amount arising from each such source. The form is prescribed by s. 190, Sch. G, No. XVII. The material portion is the second paragraph—namely: "Declaration of the amount of rents, interests, annuities, or other annual payments, for which the party is liable to allow and deduct the duty."

It will thus be seen that another element is added to the description of that which is liable to the super-tax. The subject-matter is not only to be income but "payments." Did the respondent, Blott, in the several years in question, receive that on which he has been assessed as a payment by way of income? On the facts I think it is clear that as between the company and its shareholders the same conclusion must be arrived at as that at which the House of Lords arrived in *Bouch* v. *Sproule* (1) as expressed by Lord Herschell: "The company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern." There was, in the present case, not even an option in form given to the shareholders of receiving the bonus in cash. The intention of the directors is clearly shown by them in the passage quoted above from the report for the year 1914, and that of the company by the opening words of the resolution on each occasion. It must also be borne in mind that at the material dates the company had no power under their articles directly to capitalize profits. This could only be effected

(1) 12 App. Cas. 385, 399.

by the machinery to which they resorted, and in my opinion the declaration of the bonus was in each case mere machinery for carrying into effect the desire of the company to capitalize part of the undivided profits.

It is said that in *Bouch* v. *Sproule* (1) the question arose as between a tenant for life entitled to income, and remainderman entitled to capital under the will of a testator of whose estate the shares in question formed part, and that the principle of the decision is inapplicable to the present case. I confess I am unable to see the distinction. In this case, as in the other, the question is whether the bonus shares are to be treated as a dividend and therefore income, or as an accretion to capital. The question according to the view of the House of Lords is one of fact, and the fact to be ascertained is the real intention of the company. This seems to me to determine the nature of the transaction between whatever parties the question may arise. I think, therefore, that these bonus shares were not income of the respondent. Further, I agree with Rowlatt J. that there was in this case no "payment" such as is mentioned in Sch. 9, Form XVII. I cannot express my views better than in the words of the learned judge: "I do not think that there is a payment of a dividend to a shareholder unless a part of the profits is thereby liberated to him in the sense that the company parts with it and he takes it." There was clearly no such liberation of any part of the profits in the present case. Of course, I do not mean to say that no payment can be made except in money. It may well be that if the profits or part of them were represented by tangible assets the transfer of a part thereof in kind to a shareholder by way of dividend would be a payment of dividend. In fact, this point was conceded by the respondent in argument, and nothing I have said must be so construed as to negative such a view.

Much stress was rightly laid by counsel for the Crown upon the reasoning of the judgment of the Privy Council in *Swan Brewery Co.* v. *The King*. (2) The members present were Lord Moulton, Lord Parker and Lord Sumner, the

(1) 12 App. Cas. 385. (2) [1914] A. C. 231, 236.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Warrington L.J.

judgment being delivered by Lord Sumner; it is therefore of the highest authority. The decision itself was on the construction of an Act of Western Australia imposing on a company declaring a dividend a duty on the amount or value of such dividend and providing that "dividend" should include "every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among any members or directors of any company except the salary or other ordinary remuneration of directors." The appellant company had increased its capital by the creation of new shares and the transfer of accumulated profits of the nominal amount of the new shares to the credit of share capital account, and had allotted such new shares amongst the shareholders pro rata. It was held that the company had in effect declared a dividend within the meaning of the Act equal to the nominal amount of the new shares. Obviously therefore the question for decision was far away from that in the present case. The discussion, both in argument and in the judgment, was mainly on the question whether there was any "advantage" to anybody in the mere transfer of accumulated profits to capital and the allotment of shares representing the capital; but at the end the judgment contains the following passage: "In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the company's part, and on the allottee's part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of 101,450*l.* in right of the old shares, and created instead a right of general participation in the company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them. In the words of Parker C.J.: 'Had the company distributed the 101,450*l.* among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the 101,450*l.* would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is.'" It was admitted in the argument (1)

(1) [1914] A. C. 233.

that *Bouch* v. *Sproule* (1) and cases of that nature were inapplicable to the case under discussion, and I can hardly think that Lord Sumner intended by the expressions he used to express a view of his own or to approve of a view of the Chief Justice which would conflict with that expressed by Lord Herschell in *Bouch* v. *Sproule*. (1)

On the whole I agree with the judgment of Rowlatt J. on this point as on the rest of the case. The appeal fails, and must be dismissed.

The facts in *Greenwood's Case*, so far as they are material to the decision, are different from those in *Blott's Case* only in this, that the company there had power directly to capitalize profits, and the bonus declared by them was in the form of so many shares as fully paid, and there was no necessity for agreements such as those which in *Blott's Case* were made and filed. It was admitted that the same principle must be applied in both cases. The appeal in *Greenwood's Case* therefore also fails.

SCRUTTON L.J. These two cases raise the important question whether shareholders in a company who have received, in the year of assessment, bonus shares in the company fully paid up by use of undivided profits of the company are bound to return to super-tax the face value of the shares, being the amount actually paid up on them by transfer of undivided profits of the company to the capital account of the company.

In *Blott's Case* the profits were those made in the year of assessment, except that a small sum had been carried over from a previous year, and the company having in the shareholders' report spoken of "a further dividend to the shareholders to be satisfied by the allotment of one second Preference Share for every three Ordinary Shares held by them," passed a resolution: "That it is desirable to capitalise the sum of 33,333*l.* 6*s.* 8*d.*, being part of the undivided profits of the company, and accordingly that a bonus at the rate of 33⅓ per cent. per share free of income tax on each of the issued ordinary shares of the company be declared," and be satisfied by

(1) 12 App. Cas. 385.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT.

SAME v. GREENWOOD.

Scrutton L.J.

the distribution of 33,316 of the unissued second preference shares credited as fully paid. This company had the ordinary power to increase capital, to divide profits in dividends after creating reserve funds available amongst other purposes for distribution by way of bonus amongst the members, to direct payment of dividends by the distribution of paid-up shares, with a proper contract where requisite and, after the date of the issue in question, a specific power to capitalize profits, and allot fully paid up shares to the extent of the net amount capitalized.

In *Greenwood's Case* similar issues of bonus shares were made, but in this case out of reserve funds, which included a substantial amount of profits from preceding years. In this case the directors resolved to make a bonus distribution of 10 per cent. in ordinary shares out of the revenue reserve account, and the company in general meeting passed a resolution that a specified amount of undivided profits be distributed as a bonus, and that the directors be authorized to issue an amount of ordinary shares equivalent in face value to that specified amount to the holders of the outstanding ordinary shares in satisfaction of such bonus. This bonus was not stated to be free of income tax. The company had at the time an express power to capitalize undivided profits. In this case no agreement was registered in respect of the bonus shares; in *Blott's Case* such an agreement was registered.

In neither case had the shareholder any option whether he got cash or bonus shares; he received shares or nothing.

It is not alleged by the Crown in these cases that the shareholder can be assessed for income tax on these bonus shares or the profits used to pay for them, for the undivided profits which have paid for them are the profits of the company which pays income tax for them, though on a conventional basis. But the company not being an "individual" is not assessed to super-tax on its profits, and it is, therefore, said that under s. 66 of the Finance (1909–10) Act, 1910, the shareholder must return those bonus shares or the cash dividend they represent as part of his "income from all sources."

It is to be noted that the company cannot issue fully paid-up shares by simply capitalizing the reserve fund and applying it to the payment of the shares. For the reserve fund is the company's, and fully paid-up shares must be paid for by someone other than the company. As a matter of machinery therefore a bonus or dividend payable to the shareholder must be declared and then appropriated to the payment up of the bonus shares, so that the shareholder pays for his shares by his bonus or dividend.

Under these circumstances it is argued for the Crown that the shareholder must receive a dividend with which he is to pay for the bonus shares ; that having received the dividend, he has income, and what he does with that income is immaterial to the revenue. He may save it or spend it or invest it in shares of his own company or of some other company ; it is still income when received, and as such liable to super-tax. This view undoubtedly finds considerable support from the language of Lord Sumner in delivering the judgment of the Privy Council in *Swan Brewery Co.* v. *The King*. (1) That case turns on the construction of an Australian Act which taxes " dividends," defining them as " every profit, advantage, or gain intended to be paid or credited to or distributed amongst members or directors of any company." The Privy Council held bonus shares paid up out of accumulated profits to be " dividends " under that Act, though saying (2) : " In ordinary language the new shares would not be called a dividend, nor would the allotment of them be the distribution of a dividend." The judgment states that the question is merely the construction of the particular Act, but Lord Sumner treats the transaction as one, both in business and in law, in which the shareholder receives so much dividend out of undivided profits, and then uses it in paying up the new shares.

This decision, of course, is on another statute, and is not binding on us, though entitled to the greatest respect, but in my view, and subject to a point to be hereafter mentioned, the line of reasoning goes a considerable way to support the

(1) [1914] A. C. 231. (2) [1914] A. C. 234.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD

Scrutton L.J.

argument of the Crown. But it is very difficult to reconcile it with the reasoning of a decision which is binding on us, the decision of the House of Lords in *Bouch* v. *Sproule*. (1) That was the case of the issue of bonus shares by a company paid for by capitalizing accumulated profits, where the shareholder in the view of the House of Lords had a legal option whether he would take the dividend or the shares, though commercially, as the dividend was 1500*l*. and the shares were worth 4000*l*., there was no doubt which way the option would be exercised. The exact question in the case was whether the shares were to go as income to the tenant for life or as capital to the remainderman. The House of Lords accepted the law stated by the Court of Appeal, that in the case of profits on shares in a company which had the power of distributing its profits as dividend or converting them into capital, it was the action of the company which settled whether the proceeds of shares should go as dividend or as capital. In the particular case they differed from the Court of Appeal, and held that both on the substance and form of the transaction, the company converted and "intended to convert the undivided profits into paid-up capital upon newly created shares . . . . that the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern." The present cases are stronger, for here the shareholder has no option to take cash; he gets shares or nothing.

It appears to me that the reasoning of Lord Sumner in the *Swan Brewery Case* (2) would have led the House of Lords to a different conclusion. If the transaction in form and substance commences with a payment out of profits of a dividend, the way the dividend is spent can hardly alter its character as a dividend; and if the fact that, as in that case, the dividend is compulsorily returned and shares substituted, does not affect the original payment of dividend, it would seem that in a case like *Bouch* v. *Sproule* (1), where it was optional to use the dividend to pay for shares, still less was the original

(1) 12 App. Cas. 385, 399. (2) [1914] A. C. 231.

dividend affected. The Privy Council do not state their view of *Bouch* v. *Sproule* (1), probably because for some reason, which I do not understand, counsel for the appellant treated that decision as irrelevant; but the reasonings of the two cases appear to me to be in conflict, and if so we are bound by the decision of the House of Lords. For if in *Bouch* v. *Sproule* (1) the transaction in form and substance was an increase of capital and not a payment of dividend, it is still more so in the present cases. It seems to me, if I may respectfully say so, that if the reasoning of Lord Sumner is the method to be applied, all the cases between tenant for life and remainderman, where the bonus has been adjudged to belong to the remainderman, should have been decided the other way.

The matter may be considered from another point of view. Super-tax is payable on "income from all sources," but it is not every receipt during the year that is returnable as "income" to super-tax. The owner of a ship loses it during the year and receives the insurance money, which may be more or less (at the present time, probably much more) than the capital he originally invested in the ship. No one would suggest that he should return to super-tax either all the insurance money, or the excess of the insurance money over his original capital.

A company is liquidated during the year of assessment, and the liquidator returns to the shareholders, (1.) their original capital, (2.) accretions to capital due to increase in value of the assets of the company, (3.) the reserve fund of undivided profits in the company, (4.) the undivided profits of the last year of assessment. Heads (3.) and (4.) will have paid income tax through the assessment of the company; but it appears to me that none of the heads will be returnable to super-tax as assessment; they are not income from property, but the property itself in course of division.

A shareholder holds a 10*l.* share in a company, and for greater marketability the company divides it into ten 1*l.* shares. Usually the ten shares are of greater value than the

(1) 12 App. Cas. 385.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Scrutton L.J.

original one, but I did not understand it to be contended that the increase in value is "income" to be returned to super-tax; the increased value is the property itself, not income from property.

The capitalization of undivided profits, as fully paid-up shares, is by no means the bestowal of a benefit of the full face value of the shares. A company of 10,000*l.* share capital has assets which have increased in value to 20,000*l.*, and it has 20,000*l.* reserve fund of undivided profits. Its 1*l.* shares may be worth 4*l.* It thereupon capitalizes 10,000*l.* of its reserve fund, and issues 10,000*l.* new shares fully paid. The result is that the same profits and property which were divisible among 10,000 shares become divisible among 20,000 shares, with the probable result that the shares which were at 4*l.* may fall to 2*l.* each, the exact fall depending on the prospects of the company and the higgling of the market. The original shares in *Bouch* v. *Sproule* (1) fell 7*l.* a share on the issue of bonus shares, 7*l.* 10*s.* paid. (2) To say in this case that a shareholder has received 7*l.* 10*s.* on each share issued to him when in fact he has also lost 7*l.* on each share that he holds seems to look only at one side of the matter and not at the whole. If, in the language of Lord Herschell in *Bouch* v. *Sproule* (2), the substance of the transaction is not a payment of income but an increase of capital, the capital increase does not appear to me to be income, but the property from which income will be derived; and indeed the increase of capital is only nominally an increase, if it is necessarily accompanied by a diminution of value of the original capital. To divide property into more shares does not necessarily increase the total amount of property; still less can one say that the additional shares are income.

I refer to and agree with a somewhat similar explanation of the transaction given by Neville J. in *In re Evans* (3).

For these reasons, as well as on the authority of *Bouch* v. *Sproule* (1), it appears to me that these bonus shares, being capital of the company, were not income from any source

(1) 12 App. Cas. 385. (2) 12 App. Cas. 391.
(3) [1913] 1 Ch. 30, 31.

to be returned to super-tax, and I agree with the result of the judgment of Rowlatt J. and the Special Commissioners. The appeal should be dismissed.

Both appeals dismissed.

C. A. 1920

INLAND REVENUE COMMISSIONERS v. BLOTT. SAME v. GREENWOOD.

Scrutton L.J.

Solicitor for appellants in both cases: *Solicitor of Inland Revenue.*

Solicitors for respondent in first case: *Macdonald & Stacey.*

Solicitors for respondent in second case: *Norton, Rose, Barrington & Co.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A. 1920 *Mar.* 25, 26; *April* 22.

ROBBINS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—"Trade or business"—Occupation of whole Time Servant—General Sales Manager—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 45, *sub-s.* 2, *Fourth Schedule, Part I., cl.* 5—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *s.* 49, *sub-ss.* 2, 3.

The occupation of a person who, under a contract between himself and a foreign company, is bound to give his whole time to selling their goods in this country for a remuneration by way of commission on the sales, is not a "trade or business" owned or carried on by him within the meaning of the Finance (No. 2) Act, 1915, Part III., relating to the excess profits duty, and consequently he is not liable in respect of his occupation to be assessed to that duty:—

So *held* by the Court of Appeal affirming the decision of Rowlatt J. [1920] 1 K. B. 51.

APPEAL from a decision of Rowlatt J. (1) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, raising the question whether a person, who under a contract between himself and a foreign company, was bound to give his whole time to selling their goods in this country for a commission on the goods sold, was liable

(1) [1920] 1 K. B. 51.

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

to be assessed to excess profits duty as carrying on a " trade or business " owned or carried on by him within the meaning of the Finance (No. 2) Act, 1915.

The case and the material sections of the Act are set out in the report in the Court below.

Rowlatt J. decided that Robbins was not liable to the duty and the Crown appealed.

Sir Ernest Pollock S.-G., *T. H. Parr* and *R. P. Hills* for the appellants. The respondent is liable to the duty. He is carrying on a " trade or business " within the meaning of ss. 38 and 39 of the Finance (No. 2) Act, 1915 : *Burt* v. *Inland Revenue Commissioners* (1) ; *Radcliffe* v. *Inland Revenue Commissioners*. (2) His occupation is a business of " taking commissions in respect of any transactions or services rendered " within the latter part of s. 39.

[LORD STERNDALE M.R. It is not his own business that he is carrying on, but the business of another.]

It is the business of an agent on commission.

[LORD STERNDALE M.R. If he is a servant there is no separate business.]

It is submitted that Rowlatt J. has gone wrong in the tests which he has adopted. He calls him (3) a " mere manager." That is begging the question. The business carried on by the respondent was that of selling the comptometers in this country. It is submitted that he is brought back into charge by the latter words of s. 39.

[LORD STERNDALE M.R. The case depends upon the effect of the agreement stated in the case.]

It is said that the respondent is a whole time servant of Felt & Co. If that were so the elaborate provisions of the agreement would have been unnecessary. The provisions as to restriction on assignment and the mutual covenants contained in the agreement are inconsistent with the position of master and servant. It is submitted that under the agreement the respondent is not a whole time servant.

(1) [1919] 2 K. B. 650. (2) (1919) 89 L. J. (K. B.) 267.
(3) [1920] 1 K. B. 70.

[They also referred to *Patent Castings Syndicate* v. *Etherington* (1) as showing that a person holding an office such as a director is carrying on a business within the enactments; and repeated the argument used in the Court below (2), founded on other provisions of the Act, against the contention that it could not be the intention of the Act to treat the occupation of a person in the position of the respondent as a business in respect of which excess profits duty is chargeable.]

Latter and *Aronson* for the respondent. It is submitted that the occupation of a whole time servant of one employer is not a "trade or business" within the Act: *Reg.* v. *Negus* (3); *Reg.* v. *Bailey.* (4)

[LORD STERNDALE M.R. The test is whether the employer has the right to determine how the employee shall do his work in detail.]

The respondent is carrying on the business of Felt & Co., and not a business of his own. He has no liberty to do anything except in the name of Felt & Co. All the business is carried on by the company and the respondent is guaranteed a certain salary. In order for an occupation of this kind to be chargeable it must be the business of the taxpayer himself.

As to what constitutes carrying on a business see *Sangster* v. *Kay.* (5), *Graham* v. *Lewis.* (6)

In *Thompson* v. *Amis* (7) and *Collette* v. *Lockie, Pemberton & Co.* (8) it was held that a person who was paid a salary by way of a share of profits was a "manager or person concerned in the management of the trade or business who is remunerated out of the funds of the trade or business" within the meaning of s. 49 of the Finance Act, 1916.

A different interpretation was suggested by Younger J. in *Patent Castings Syndicate* v. *Etherington* (9), but that was not accepted in *Radcliffe* v. *Inland Revenue Commissioners.* (10)

(1) [1919] 1 Ch. 306; 2 Ch. 254.
(2) [1920] 1 K. B. 65.
(3) (1873) L. R. 2 C. C. 34.
(4) (1871) 12 Cox C. C. 56,
(5) (1850) 5 Ex. 386.
(6) (1888) 22 Q. B. D. 1.
(7) [1917] 2 Ch. 211.
(8) [1918] W. N. 262.
(9) [1919] 1 Ch. 318.
(10) 89 L. J. (K. B.) 267.

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Sir Ernest Pollock S.-G. in reply referred to *Smith* v. *Anderson* (1) and *Inland Revenue Commissioners* v. *Maxse*. (2)

Cur. adv. vult.

April 22. LORD STERNDALE M.R. This case raises a question as to the construction of ss. 38 and 39 of the Finance (No. 2) Act, 1915; and also as to the construction of the agreement under which the respondent was performing the services to his employer.

I am inclined to think that the second question is the more important of the two; but in order to see whether Mr. Robbins does come within the sections so as to be liable to assessment, it is necessary to consider the sections.

Sect. 38 provides that: "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies, in any accounting period"—between certain dates—"exceeded, by more than two hundred pounds, the pre-war standard of profits," a duty which is varied in amount from time to time. Therefore the foundation of the duty is that it shall be charged upon the profits arising from any "trade or business" to which the Act applies.

Sect. 39 then proceeds to define those trades and businesses. It says: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting"—I need not read all the exceptions; the only one which would apply to this case is "offices or employments."

Then there follows another clause, to which I will refer in a moment; but pausing there, it is well just to see what the section does apply to. As I have said, it applies to trades or businesses carried on in the United Kingdom or owned or carried on by anybody resident in the United Kingdom. Then it goes on after setting out the exceptions: "but

(1) (1880) 15 Ch. D. 247. (2) [1919] 1 K. B. 647.

including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

That section has been interpreted by this Court in *Burt* v. *Inland Revenue Commissioners* (1), where the late Master of the Rolls said: "It will be observed that the language of s. 39 is very comprehensive. It begins by including 'all trades or businesses of any description'—the appellants are obviously within that"—that is, the appellants in the case which I am citing—"'except'—and then the question is whether they are within the exceptions. The exceptions are lettered (*a*), (*b*), (*c*). Then the section goes on—'but including' (and I read that as meaning that if a person would otherwise be within (*a*), (*b*) or (*c*), if he falls within the description of what follows he is excepted from the exception, and therefore within the charging clause) 'but including the business of any person taking commissions in respect of any transactions or services rendered.'"

That construction was also adopted by Sankey J. in the Court below in the same case, and by the other two members of the Court of Appeal (Warrington and Scrutton L.JJ.); and it was adopted by this Court in *Radcliffe* v. *Inland Revenue Commissioners*. (2)

That construction is perhaps looking upon the section as rather more logical than it really is, and it may well be that many of these clauses were introduced, very likely as amendments during the passage of the Bill through Parliament, without due consideration of the effect which they would have upon one another. But that is the construction which has been adopted by this Court, and therefore of course we may take it as being the proper construction.

It would seem to follow that as offices or employments are excepted specially from the operation of the beginning of the section, it must have been contemplated

(1) [1919] 2 K. B. 650, 664. (2) 89 L. J. (K. B.) 267.

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Lord Sterndale M.R.

that some offices or employments might be within the first part of the section. I dare say they might; I do not know what offices or employments exactly would come within it. I mean to say, I do not know the nature of them; I am not suggesting a doubt that there may be some. But I think this is clear, that they must be offices or employments which involve the carrying on of a business by the man who holds the office or employment. That seems to me to be the foundation of the whole section. There must be a business, and the person who is to be taxed must be carrying on that business. In the words of Rowlatt J. (1): "A man who carries on some business which is his own independent business, although it may include some office or employment involving a payment by commission in respect of transactions or services rendered." It does not, in my opinion, include a person who is remunerated for services either wholly or partly by commission or who may in one sense of the word be described as an agent, if he be merely rendering those services or acting as agent in that way as an assistant of a business of somebody else, a business which does not belong to him and of which he does not take the profits.

It seems to me that it is not made any less the fact by the inclusive clause which I have read: "but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description." That inclusive clause still rests upon there being a business of a person taking commission, and that must be, as I have said, a business of his own. It does not, in my opinion, apply to the instance which was mentioned during the argument of an ordinary position of salesman in a shop or any mercantile business, who is remunerated as salesman wholly or partly by commission. Nobody would say that that man was carrying on a business. He is employed in a certain capacity, and he is employed in a business with the profits of which he has nothing whatever to do except so far as his remuneration may possibly be based upon them.

(1) [1920] 1 K. B. 70.

Another instance which was mentioned was that of a manager of a multiple shop. He is not carrying on the business of a multiple shop. He is carrying on the business of the owner of the multiple shop so far as his branch is concerned, and he is an assistant in the carrying on of that business; but he does not come within the words of Rowlatt J. which I have stated and with which I agree. I may say that they were prefaced by Rowlatt J. by this negative clause: "The expression 'trade or business' as used in the Act cannot refer to the occupation of a mere whole-time servant." (1) With that I also agree.

That, I think, is the construction of the section, and that leaves as the only question: what was the position of Robbins? Was he a whole-time servant, or was he a person carrying on a business of rendering services for commission or of an agent of any description? I do not for a moment say there may not be such a business; in fact the businesses in *Burt* v. *Inland Revenue Commissioners* (2) and *Radcliffe* v. *Inland Revenue Commissioners* (3) were instances where a man was carrying on a business of an agent and carrying on a business of a person remunerated for services by commission. I do not say that it is impossible that a person who was rendering services only to one other person, that is to say, who had to give his whole time to that business, might not be carrying on a business. It would be very much more difficult to see how he was carrying on an independent business; but I do not say it is impossible. But the question here is: was Robbins in that position; or, rather, I ought to say, in which position was he? Was he in the position of a whole-time servant, or was he in the position of a man carrying on a business of rendering services for which he was paid by commission or of an agent of any description? In order to see that, we have to look at the agreement under which he was employed.

The Commissioners said that they considered that he was within the description of "agent of any description," and

(1) [1920] 1 K. B. 70. (2) [1919] 2 K. B. 650.
(3) 89 L. J. (K. B.) 267.

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Lord Sterndale M.R.

they said so for this reason. They said: "We were of opinion that the term 'agent of any description' was wide enough in itself to include persons employed under a contract of employment, and the fact that it does include such persons is proved by the exemption granted to commercial travellers." Now I do not say whether that is right or wrong, but it seems to me entirely to overlook this: that the inclusive clause does not say, "including an agent of any description," but it says, "including the business of any agent of any description."

As the matter turns entirely, in my opinion, upon the agreement between Robbins and his employers, it must be considered. It is very nearly as obscure as the section. It was an agreement between a company which is called in the agreement for shortness "Felt," and Mr. Robbins. It contains certain provisions which seem to indicate that the business is that of a commission agent; on the other hand it contains several provisions which point to the position of a whole-time servant; and we have to determine what is the effect of the whole agreement.

It begins no doubt with provisions which rather show that Robbins is not a whole-time servant; because "Felt" grants to Robbins the exclusive right to sell comptometers in a certain territory on the terms and under the obligations mentioned. It is a long agreement, and I shall not read the whole of it, but there are some provisions which it is necessary to read. "Felt" agrees to pay the rent of the main office in London. He agrees to pay for heating, cleaning, lighting, office furniture, supplies and postage—in fact everything except travelling expenses; and also the salary of one stenographer or office girl—for the London office, at an amount not to exceed a certain sum mentioned. Then it provides that "Felt" will pay the employer's contribution under the National Insurance Act for any sub-agents, although they may be working for or employed by Robbins. It provides that if for a certain time Robbins shall continually give his whole time and attention to energetically and industriously pushing the sale of

comptometers to the best of his ability, and perform certain other conditions, the agreement shall be extended.

Then I do not think there is anything else to which I need refer in that part, which contains the obligation of the employer. The second part contains the obligation of Robbins. He has to sell and manage the selling campaign of comptometers, and put forth his best endeavours to sell the largest number he can. He has to mail to "Felt" twice each week certain documents which will give "Felt" information as to the business that has been done. He has—and this to my mind is a very important provision—to give his whole time exclusively to pushing energetically the sale of comptometers in the territory. He has to maintain a force of well-trained salesmen of a quantity considered sufficient by "Felt." So that "Felt" has the direction of the number of salesmen there shall be. He may establish branch offices in various places in the United Kingdom, and if he does, "Felt" has to pay for all the office furniture in those branches and also all expenses except travelling expenses for a certain time. When he has sold any comptometers he has to account to "Felt" for the moneys by paying them into an account of "Felt's" at the London Joint Stock Bank, upon which account Robbins has no authority to draw at all; and he has each mail day to furnish a full and complete list of all moneys and securities paid into the bank. For his remuneration a separate account is opened in the London Joint Stock Bank in the joint names of himself and "Felt," and on that he can draw for expenses in relation to the business. He agrees to follow the usual rules and regulations of "Felt" as they exist or as the development of events necessitates for the protection of "Felt's" interests or the mutual interests of all "Felt's" agents. He has to take care of all comptometers sent into the territory and to attend without further remuneration to all matters not directly connected with the selling which are necessary in connection with the carrying on of this business in the territory. Then he is given the prices. He has not a discretion as to prices; he has the prices sent to him at which he is to sell.

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Lord Sterndale M.R.

I think those are really the relevant provisions of the agreement. I ought to say perhaps that first he called himself sales agent; afterwards, after some conversation with the Surveyor of Taxes, he called himself sales manager, but I do not really care what he called himself; the question is what he was under the agreement.

As I have said, I do not say that there may not be a business of a person remunerated by commission for services where those services are rendered to one employer and the person remunerated has to devote his whole time. I do not say it is impossible that there can be such a case, but it is a very strong factor in coming to the conclusion that the man is a servant, that he has to devote his whole time to the employer; he cannot do any business for anybody else, and has a right to the extension of his agreement if he does devote his whole time to his employer. Then it seems to me that on this agreement, so far as an employer on the other side of the Atlantic can direct, "Felt" has stipulated that Robbins, in the details of the business, shall conform with "Felt's" instructions. That is another test of whether a man is a servant, or an agent as distinguished from a servant. As I have pointed out, he has no control over the money; he has to pay it into an account upon which he cannot draw, and he is subject, in regard to the number of his sub-agents, and in a great many other matters, to the direction of "Felt," who pays all the office expenses and all expenses except travelling.

I perhaps ought to say as a matter of fact that such sub-agents as were employed were employed, not by Robbins, but an agreement was made direct with "Felt"; but still the agreement contemplated the other state of things.

Looking at all these matters I think, although this agreement is not absolutely clear, that this man was a whole-time servant, to use Rowlatt J.'s expression, and was not carrying on a business of his own at all.

He was no more, in my opinion, carrying on a business than a salesman or a manager of a multiple shop, to which I have referred. He was acting as an assistant to "Felt" in order to carry on "Felt's" business, and the business

which was being carried on was not his; the profits which were being made were not his; what was his was the remuneration that he got for his assistance in "Felt's" business.

I ought to say that Rowlatt J. laid some stress upon the Fourth Schedule, Part I., clause 5, which deals with a deduction that may be made in respect of a business for increased remuneration paid to a manager, and contains a prohibition of a deduction of that increased remuneration, with a provision that the owners of the business may be compensated by the manager for loss afforded by the absence of the deduction; and then another provision that in that case it should be treated as excess profits duty paid by the manager from whom it is recovered. I do not myself think it has very much bearing upon the matter. As far as it goes, it seems to me to support the conclusion to which I have come, that a man who is a manager only is not a person intended to be hit by this Act; because if he were directly taxable under the Act those complicated provisions would not be necessary. Of course, the object of that clause is to prevent the evasion of excess profits duty by paying a large sum to a person who is called, and very likely is, managing director, but who is really the person who is entitled substantially to the profits of the business.

Then Rowlatt J. also referred to another section of the Finance (No. 2) Act, 1915, s. 45, sub-s. 2. That again I do not think has any direct bearing on this matter, but I think it also points in the direction of the conclusion to which I have come.

In my opinion the judgment of Rowlatt J. was right, and I think, therefore, that the appeal should be dismissed.

WARRINGTON L.J. This is an appeal by the Commissioners of Inland Revenue from an order of Rowlatt J., reversing a decision of the Special Commissioners, by which they confirmed an assessment to excess profits duty of Mr. H. E. Robbins, the respondent on the present appeal.

The question, on the answer to which the liability of the

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Warrington L.J.

respondent to the duty depends, is whether he was, during the material period, receiving profits arising from a trade or business to which the provisions of Part III. of the Finance (No. 2) Act, 1915, apply.

The material section is s. 39. [His Lordship read the section and continued:] I think the effect of this section, so far as the question raised on the present appeal is concerned, is that "employments" in general are excluded from the operation of the Act, but if the employment is of such a nature that the person employed can be properly regarded as carrying on the business of a person taking commissions in respect of transactions or services rendered, or the business of an agent of any description not included in the final exception, then although his occupation might also be properly regarded as an employment, he would still be liable to the duty. But to bring him under the liability he must not only be an agent but must be carrying on a business as agent and receiving profits arising therefrom.

Examples of cases in which the person sought to be charged was held to be carrying on the business of an agent or of a person receiving commissions are to be found in the case of *Burt* v. *Inland Revenue Commissioners* (1) and *Radcliffe* v. *Inland Revenue Commissioners* (2), the judgment in which was delivered on December 8, 1919.

In the present case the respondent is employed by an American company under the terms of an elaborate written agreement dated April 8, 1913. By that agreement the company grants to him the exclusive right to sell their goods in the United Kingdom, and he binds himself to give his whole time exclusively to the work he undertakes for them—namely, pushing the sale of their goods. The agreement contains detailed provisions for the conduct of the business, and lays down what the respondent and the company respectively were to do.

The business (that is to say, that of selling the company's goods) was carried on at offices in Kingsway in the name of the company, the respondent being described as their general

(1) [1919] 2 K. B. 650. (2) 89 L. J. (K. B.) 267.

sales agent, and more recently as their general sales manager. His remuneration was in the form of a commission of 30 per cent. on the cash received from each sale, and was therefore dependent on the amount of business done by him for the company.

We have had before us a long discussion upon the question whether upon the true construction of the agreement the respondent would properly be described as a servant of the company, and the agreement as one of service. For some purposes the precise nature of the legal relation in this respect may be of importance, but I do not think it is so in the present case. The respondent is substantially in the position of a servant in this respect, that he is bound to perform certain duties for a particular employer and to give his whole time exclusively to the performance of those duties. Those duties consist in conducting in this country the business of selling the goods of his employer. Can he be properly described as engaged at the same time in a separate business of his own—namely, that of earning his remuneration by the work he does as agent for his employer ?

It seems to me that the occupation of a person in such a position would not be naturally described as the carrying on of a business (except of course that of his employer) nor would his remuneration be described as profits of a business.

I desire to avoid expressing any opinion except on the question raised by the facts of the present case, but on those facts I am of opinion that the decision of the learned judge was right, and this appeal fails.

SCRUTTON L.J. This case raises again the question which has frequently puzzled the Courts already, and will probably continue to puzzle them—namely, the question of what exact meaning and intention, if any, the Legislature had in mind when they passed the sections imposing the excess profits duty.

The profits taxed are those arising from " trades or businesses of any description carried on in the United Kingdom." The

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Scrutton L.J.

word "trades" is used in Sch. D. of the Income Tax Acts in conjunction with "professions, employments and vocations." The word "businesses" is not in the taxing schedules of the Income Tax Acts. The Legislature next proceeds to "except" from "all trades and businesses," certain classes of occupation, some of which presumably must be included in "all trades and businesses," or it would be unnecessary to except them. The Legislature excepts "husbandry," "offices or employments," and certain "professions." Husbandry clearly might be a "trade or business"; the Legislature apparently assumes that at any rate some "professions" may be trades or businesses; and that at any rate some "offices or employments" may be trades or businesses. I at present do not understand what is meant by "offices." The offices in Sch. E of the Income Tax Act are public offices, which one would hardly think were intended to be subject to excess profits duty. It was suggested that a rector might hold an "office," but he can hardly be supposed to carry on a trade or business. Again, as to "employments," which is a word in Sch. D of the Income Tax Act, the first rule of the second case under Sch. D rather suggests that "employment" means an employer as well as a person employed. But I do not think that Parliament can have meant that every person employed carries on the trade or business of an employee, as distinguished from his service in his master's business.

However, having excepted offices and employments, the Legislature proceeds to re-include (1.) the business of any person taking commissions in respect of transactions or services rendered; (2.) the business of any agent of any description, not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not dependent on the amount of business done or any other contingency.

This seems to raise at once the general question: Is the whole-time servant of an employer, partly remunerated by commission, the business of a person taking commissions or of an agent of any description whose remuneration is not

wholly fixed? For instance, is the manager of a multiple shop, partly paid by commission on his sales, within this description? He has presumably an employment, and is therefore excluded unless the subsequent words bring him in. Now the subsequent words include not a person, but the business of a person; and in the cases of whole-time employment the employee has not a business; the business is that of his employer. For it does not seem possible to argue that the employee has the business of being an employee, and is therefore included in "the business of any person taking commissions," though the business in which he works is that of his employer, or that, as all servants are agents of their employers for some purposes, the employee was "an agent of any description." The Solicitor-General disclaimed this interpretation of the statute.

All the cases hitherto decided as to persons taking commissions, or agents, are cases where the person or agent had a business of his own, which might be wider than the business of any particular employer. The taxpayer, in the case of *Burt* v. *Commissioners of Inland Revenue* (1), carried on the business of providing secretarial staff and offices for various companies. In *Radcliffe* v. *Commissioners of Inland Revenue* (2) his business was to act as manager and shipbroker for various single-ship companies. Commercial travellers who, having been excluded once under "employments," are expressly excluded a second time, may be included by the intervening words, for they may travel for several employers.

The question then in the case of Robbins, the taxpayer in the present case, is whether he is a whole-time servant, and therefore excluded because he carries on no business of his own, or whether he is a licensee or agent, as distinguished from a servant, who has a business of his own, that of selling certain goods in a district, the exclusive rights over which have been assigned to him.

His agreement is oddly expressed, if he is a servant; it assigns to him an exclusive right to sell comptometers in Great Britain and Ireland, and it contains provisions (s. 7) as

(1) [1919] 2 K. B. 650. (2) 89 L. J. (K. B.) 267.

C. A. 1920

ROBBINS v. INLAND REVENUE COMMISSIONERS.

Scrutton L.J.

to the assignability of the right. It does not contain any express provision that he shall obey orders, though the last clause requires him to perform everything he does under the contract to the satisfaction of the other party, under pain of cancellation of the contract. But it requires him to sell all comptometers in the name of "Felt" at a price fixed by "Felt," and to pay the price into "Felt's" banking account, on which he cannot draw. He is to report fully twice a week everything he does, to give his whole time to selling these comptometers, and no others, to employ as many salesmen as "Felt" considers sufficient, and to provide offices as directed and approved by "Felt."

I have come to the conclusion, though the agreement is oddly expressed, that Robbins is a whole-time servant of "Felt." I think he would be a clerk or servant, within the contrasted decisions of *Reg.* v. *Negus* (1) and *Reg.* v. *Bailey.* (2)

It follows, therefore, that he has no "business of a person taking commissions"; the business is the business of his employer, "Felt"; nor has he the business of "an agent of any description," for, in my opinion, Parliament did not use these words to cover a whole-time servant who, if an agent, has no business.

It follows that he is not assessable to the excess profits duty, and the decision of Rowlatt J. should, in my opinion, be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *The Treasury Solicitor.*
Solicitors for respondent: *Fraser & Christian.*

(1) L. R. 2 C. C. 34. (2) 12 Cox C. C. 56.

G. A. S.

ELLIOTT STEAM TUG COMPANY, LIMITED *v.* JOHN PAYNE AND COMPANY.

1920
March
4, 5, 8, 31.

[1915. E. 599.]

Shipping — Charterparty — Termination — Requisition — Breach by Owners — Detention of Vessel from Charterers — Requisition during Breach — Measure of Damages.

By a charterparty a steamship was hired for one calendar month for a certain sum, the hiring to continue at the same rate until the charterers should determine it by fourteen days' notice. Several months afterwards the owners gave fourteen days' notice purporting to determine the hiring, and later the steamship was requisitioned by the British Government:—

Held, that the charterparty meant that the hiring was to continue indefinitely as long as the steamship continued to exist subject to the right of the charterers to put an end to it at any time by giving the stipulated notice; and that the hiring was not determined either by the owners' notice, or by the requisitioning.

While the owners of a steamship were detaining her from the charterers in breach of the charterparty, she was requisitioned by the British Government. In an action by the charterers against the owners for damages for their detention of the steamship:—

Held, that in the absence of proof to that effect, the requisitioning could not be regarded as arising out of the detention of the vessel by the owners, and that the damages which the charterers were entitled to recover for the detention by the owners did not include damages in respect of the period of the requisition.

Davis v. *Garrett* (1830) 6 Bing. 716, 724 dictum held inapplicable.

ACTION in the Commercial List tried by Rowlatt J.

The plaintiffs, the Elliott Steam Tug Co., Ld., carried on business in London as owners of steamtugs. The defendants, John Payne & Co., were the owners of the steamtug *John Payne* belonging to the port of Bristol.

By a charterparty dated August 18, 1914, the defendants agreed to let and the plaintiffs to hire the said steamtug for the term of one calendar month from the date of the charterparty; the tug to be in every way fitted for the service and to be maintained by the defendants, with a full complement of officers, seamen, engineers and firemen, and the captain appointed by the defendants to follow the instructions of the plaintiffs; the tug to be employed between safe ports in

1920

ELLIOTT STEAM TUG COMPANY v. JOHN PAYNE AND COMPANY.

London with the option of towing between the United Kingdom and continental ports and in the Channel as the plaintiffs should direct; the charterers to accept and pay for the hire of the tug at the rate of 220*l.* per calendar month. The charterparty contained an exception of the restraint of princes; and at the end of it was the following typewritten clause: "The hire to continue at the same rate of payment until charterers determine same by 14 days' notice."

The plaintiffs employed the tug under the charterparty, and they had never given any notice to determine the hiring.

By letters dated December 4 and 16, 1914, the defendants gave notice to the plaintiffs purporting to terminate the charterparty.

The plaintiffs alleged that on February 19, 1915, the tug was for the time being practically withdrawn from the service of the plaintiffs in consequence of the crew refusing to proceed outside of the Thames estuary owing to the presence of German submarines.

On May 3, 1915, the defendants withdrew the tug from the custody of the plaintiffs and sent her to Bristol for the purpose of undergoing alleged necessary overhaul and repairs. By a letter dated May 21, 1915, the defendants gave the plaintiffs notice that they had sent the tug to Bristol for repairs, and claimed the right and purported to terminate the charterparty by fourteen days' notice. The plaintiffs refused to accept the notice, but the tug was not restored to them by the defendants.

On June 10, 1915, the plaintiffs brought the present action against the defendants. In their points of claim the plaintiffs alleged inter alia that the plaintiffs had not given any notice to determine the hiring of the tug under the charterparty; that the defendants had been for some time desirous of terminating the charterparty, and not having the power themselves to do so had sought to force the plaintiffs to exercise their option to determine it, and for that purpose the defendants in breach of the charterparty had not given the plaintiffs the use of the tug, and had not at all times kept her at the disposal of the plaintiffs or in every way fit for the

service nor provided the necessary equipment; that for the like purpose the defendants had not provided a suitable master and crew; that the master with the approval of the defendants had not followed the instructions of the plaintiffs, had not used all dispatch in prosecuting voyages, and had not rendered all customary assistance with the crew; and that the defendants, though advised by the plaintiffs of their dissatisfaction with the master and crew, had not investigated the matter, and had not made any change in the appointments; that the particulars of these various allegations were as therein stated; that the defendants by the letter of May 21, 1915, claimed the right and purported to terminate the charterparty by fourteen days' notice, and notwithstanding the plaintiffs' protests continued to withdraw the tug from the plaintiffs; and that by reason of these breaches of charterparty the plaintiffs had suffered damage. And the plaintiffs claimed a declaration that they were entitled to use the tug under the charterparty until they might determine the same by fourteen days' notice, and that the defendants had not the option to terminate the charterparty by notice; an injunction to restrain the defendants from withdrawing the tug from the service of the plaintiffs under the charterparty or from employing her except in the service of the plaintiffs or as the plaintiffs might lawfully direct, or from keeping or placing her at the disposal of themselves or any person other than the plaintiffs, or from preventing the master from following the lawful instructions of the plaintiffs; and damages.

The defendants in their points of defence and counterclaim delivered on July 7, 1915, stated that they admitted that no notice to terminate the charterparty had been given by the plaintiffs, but that they did not admit that the charterparty still continued; that it was an implied term of the charterparty that the defendants should have the right to terminate the hiring of the tug by reasonable notice to the plaintiffs, that a reasonable notice was a fourteen days' notice, and such notice was duly given to the plaintiffs by letter from the defendants dated May 21, 1915, and the hiring accordingly terminated on the expiration of that notice; that all the

1920

ELLIOTT STEAM TUG COMPANY v. JOHN PAYNE AND COMPANY.

allegations in the points of claim and the particulars thereunder of breaches of charterparty by the defendants were denied with certain specified admissions and explanations; that alternatively the defendants were entitled to terminate the hiring of the tug by reason of the matters following—namely, by alleged continuous and unreasonable overwork of the tug by the plaintiffs, making it impossible for the defendants to attend reasonably to her upkeep, alleged continuous overworking of the master and crew, and alleged putting of the tug in danger on several occasions; and that the plaintiffs had not suffered the alleged or any damage; and the defendants counterclaimed for a declaration that the hiring of the tug terminated fourteen days after May 21, 1915, for a sum in respect of certain bunker coal, for an account of the defendants' proportion of certain salvage moneys, and for damages for alleged improper use of the tug.

The plaintiffs, in their reply delivered July 13, 1915, joined issue, stated that they had paid into Court certain sums in respect of the counterclaim, and denied that the defendants were entitled to the relief for which they counterclaimed.

On July 16, 1915, the British Government made a requisition of the tug, which continued until March 31, 1920, and the defendants were thereby prevented from restoring her to the plaintiffs, even if they wished to do so.

During the period of the requisition the proceedings in the action were stayed.

On February 6, 1920, the defendants redelivered their points of defence and counterclaim, amended as to the points of defence by the addition of an alternative plea that the hiring of the tug had terminated on July 16, 1915, the tug having been on that date requisitioned and taken for service by the British Government; and amended as to the counterclaim by the addition of an alternative claim for a declaration to that effect.

On February 28, 1920, the plaintiffs redelivered their reply, stating that the charterparty did not terminate on July 16, 1915; that if the tug was requisitioned by the British Government she was requisitioned at the instigation or wish of the

defendants; that the defendants never alleged until the amended defence was delivered that the charterparty was terminated by the requisitioning, and the parties had since July, 1915, acted on the footing that the charterparty was not thereby terminated; and that in the circumstances the defendants were estopped from alleging that the charterparty was terminated by the alleged requisitioning.

On March 4 and 5, 1920, the action was tried by Rowlatt J.

On behalf of the plaintiffs evidence was brought in support of the allegations in their points of claim and reply; and on behalf of the defendants evidence was brought in support of the allegations in their points of defence and counterclaim.

Dunlop K.C. and *van den Berg* for the plaintiffs. The plaintiffs are entitled to the relief which they claim.

The charterparty has never been determined. It has not been determined by notice. The instrument on its true construction means that the tug is hired for one month at a certain rate, and that thereafter the hiring is to continue at the same rate indefinitely until the plaintiffs determine it by fourteen days' notice. It is admitted that the plaintiffs have never given notice to determine the hiring. The defendants had no power to determine the hiring either under the charterparty or otherwise, and the notices by which they purported to determine it were inoperative and void. The charterparty was not determined by the requisitioning of the tug: *Elliott Steam Tug Co.* v. *Duncan & Sons.* (1)

The evidence shows that the defendants were guilty of the acts and omissions attributed to them by the plaintiffs in the points of claim, and these acts and omissions amounted to breaches by the defendants of the charterparty for which the plaintiffs are entitled to damages. In particular the defendants committed a breach of the charterparty by their detention of the tug from the plaintiffs in and after May, 1915, for alleged necessary repairs. The repairs were not necessary, and if they were the detention was longer than was required

(1) (1918) 34 Times L. R. 583.

1920

ELLIOTT STEAM TUG COMPANY v. JOHN PAYNE AND COMPANY.

for accomplishing them. For that detention the plaintiffs are entitled to damages at least down to the date of the requisitioning of the tug.

Further, in the absence of proof to the contrary, the requisitioning of the tug must be regarded as having arisen out of its wrongful detention by the defendants, and the plaintiffs are therefore entitled also to damages in respect of the period of the requisitioning: see *Davis* v. *Garrett* (1), per Tindal C.J.; *Lilley* v. *Doubleday* (2); *Morrison & Co.* v. *Shaw, Savill & Albion Co.* (3); and *Shaw & Co.* v. *Symmons & Sons.* (4)

As the defendants were committing breaches of the charterparty, they are not entitled to rely upon the exception of the restraint of princes contained in the instrument: *Morrison & Co.* v. *Shaw, Savill & Albion Co.* (3)

MacKinnon K.C. and *Raeburn K.C.* for the defendants. The plaintiffs have no cause of action, or if they have they are not entitled to all the relief which they claim.

The charterparty was determined before the alleged breaches thereof by the defendants took place. The charterparty on its true construction contained an implied term that the defendants were to be entitled to determine it by a reasonable notice, which would be a fourteen days' notice. It was determined by the notice which the defendants gave to the plaintiffs on December 4 or on December 16, 1914, or at all events by the notice of May 21, 1915. If it was not determined by any of these notices it was determined by the requisitioning of the tug on July 16, 1915.

The plaintiffs have failed to prove that the defendants were guilty of any of the acts or omissions attributed to them in the points of claim and the reply. None of these acts or omissions, if any, amounted to breaches of the charterparty entitling the plaintiffs to an injunction or damages. The defendants detained the tug from the plaintiffs in and after May, 1915, for the purpose of executing necessary repairs, and they were justified in so detaining her. If the defendants did detain the tug from the plaintiffs in breach of the charter-

(1) 6 Bing. 716, 724.
(2) (1881) 7 Q. B. D. 510.
(3) [1916] 2 K. B. 783, 795.
(4) [1917] 1 K. B. 799.

party, the plaintiffs are only entitled to damages for the detention down to the commencement of the action.

The requisitioning of the tug did not arise out of its detention by the defendants, and for that reason the dictum of Tindal C.J. in *Davis* v. *Garrett* (1) and the other authorities cited have no application, and the plaintiffs are not entitled to damages in respect of the period of the requisitioning.

For the same reason the defendants are not disentitled as regards the period of requisition from relying upon the exception of the restraint of princes in the charterparty, the case being entirely distinguishable from *Morrison & Co.* v. *Shaw, Savill & Albion Co.* (2)

March 8. ROWLATT J. I will now deliver judgment on all the points that arise in this action, except one point, on which I propose to reserve my decision to another day.

The first question is, what, on the true construction of the charterparty, is the duration of the period for which the tug was hired by the plaintiffs? The charterparty contains a clause providing that the tug is to be hired for one calendar month at a certain sum for that term, and also the following typewritten clause: "the hire to continue at the same rate of payment until charterers determine same by 14 days' notice." In my opinion these provisions can only mean that the hiring of the tug at the specified rate is to continue indefinitely, as long as the tug remains in existence, subject to the condition that the plaintiffs may put an end to it by giving the stipulated notice. It is an extraordinary arrangement, but, if the document be construed according to its plain meaning, there can be no doubt that it is the arrangement into which the parties have entered.

It follows that the defendants had no power to terminate the hiring of the tug, and that the notices by which they purported to do so in December, 1914, and May, 1915, were void and inoperative.

Neither can it be said that the defendants were entitled to treat the hiring as having been terminated by any act of the

(1) 6 Bing 716, 724. (2) [1916] 2 K. B. 783.

1920

ELLIOTT STEAM TUG COMPANY v. JOHN PAYNE AND COMPANY.

Rowlatt J.

plaintiffs. The defendants allege that the conduct of the plaintiffs was in many respects unreasonable and harassing, but I am unable to find that it amounted in any instance to such a breach of the charterparty as enabled the defendants to say that it constituted a repudiation of the contract.

Nor are the defendants justified in their contention that the hiring was terminated by the requisitioning of the tug on July 16, 1915. In my opinion, as I have already said, this charterparty was to continue in force for an indefinite time, and in this case, as in the previous case of *Elliott Steam Tug Co.* v. *Duncan & Sons* (1), I must come to the conclusion that the requisitioning of the vessel did not put an end to the charterparty.

I therefore think that the charterparty was not terminated by any of the causes relied upon by the defendants, and that it still remains in force.

That being so, if at any time since the date of the charterparty the defendants have, without lawful excuse, failed to place the tug at the disposal of the plaintiffs, they have committed a breach of the charterparty for which the plaintiffs are entitled to relief. I think, however, that the case is one in which the relief, if any, should take the form not of an injunction, but of damages.

It appears that on February 19, 1915, the tug was practically withdrawn from the service of the plaintiffs in consequence of the refusal of the crew to leave the estuary of the Thames because of the risk of attack by German submarines. The tug was at work in the Thames, but the plaintiffs wanted her to go elsewhere and the crew did not comply with their wish. The defendants were bound to procure a crew who would carry out the instructions of the plaintiffs, and their failure to do so in this instance constituted a breach of contract in respect of which the plaintiffs are entitled to an inquiry as to damages.

It further appears that on May 3, 1915, the defendants withdrew the tug from the plaintiffs and sent her to Bristol, where the defendants' works were, for repairs, and kept her

(1) (1918) 34 Times L. R. 583.

there until she was requisitioned. I do not say that the removal of the vessel by the defendants to Bristol was unjustifiable, but I think they kept her there longer than was necessary. I find that the repairs might have been effected by June 1, 1915, and that as from that date the defendants withheld the tug from the plaintiffs in breach of the charterparty. I therefore hold that the plaintiffs are entitled to damages for the period between that date, on which the tug should have been returned to them, and June 10, 1915, the date of the writ in the action.

The important question remains whether or not the damages which the plaintiffs are entitled to recover in respect of the defendants' breaches of the charterparty should include damages for the loss of the tug to the plaintiffs during the period of her requisition. That is a question of some difficulty, and I will consider it further before deciding it. (1)

March 31. ROWLATT J. read the following judgment: In this case I disposed at the hearing of all questions except one. The point I reserved arises in this way. The defendants, so I have held, in breach of the charterparty withdrew the ship from the service of the charterers claiming to determine the hiring. The charterers did not accept the repudiation, but continued to insist on the ship being restored. While matters were in this position the vessel was requisitioned by the Government, and the owners were thereafter prevented from restoring her to the service of the charterers if they wished to. Under these circumstances it was said for the plaintiffs that the ship when requisitioned was to be treated as a vessel deviating from a voyage contracted for, and that the owners were liable for damages calculated over the whole period of the requisition. I do not think the point turns on the exception of restraint of princes, because it seems to me that when the owner is prevented by the law of the land from using his vessel in the service of the charterer the result must be (independently

(1) As to the counterclaim his Lordship held that the defendants were entitled to a sum in respect of the bunker coal, and to a proportion of the salvage moneys.

1920

ELLIOTT STEAM TUG COMPANY v. JOHN PAYNE AND COMPANY.

Rowlatt J.

of any exception) that the same law cannot make him liable in damages. It surely cannot call upon him to do two inconsistent things at the same time. Reference was made however to the judgment of Tindal C.J. in *Davis* v. *Garrett* (1). The passage relied upon, which I think may be called a locus classicus, being extremely carefully and accurately expressed, as the decisions of that learned judge so commonly were, is as follows: "But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done." It is to be observed that the learned judge is there dealing with damage that did arise from and in his words was attributable to the breach, and the decision was that it was none the less recoverable because it was not shown that it would not have happened if there had been no breach. I do not read the principle laid down to be that all damage occurring during the period of a breach is to be treated as connected with it unless the contrary is shown, but that damages flowing from the act constituting the breach—in that case navigating the vessel where and when she met with disaster—could not be excluded merely because they might have flowed from navigating her on the course contracted for. If the larger rule indicated above is to be applied it would seem to follow, indeed I think it follows from the plaintiffs' argument here, that if a tenant of a house wrongfully held over for a day after the expiry of his term and on that day the house were requisitioned he would be responsible in damages for the requisitioning. This is, I think, out of the question. In my view the requisitioning, whether in the case of the vessel in question in this action, or in the case of a house such as I have instanced, is not to be regarded, unless it is proved to be so in fact, as arising out of the use of the vessel or house at the time but as due to a liability incident to its mere existence, and that the rule in *Davis* v. *Garrett* (1) has no application.

(1) 6 Bing. 716, 724.

Under these circumstances I decide the point reserved in favour of the defendants.

[His Lordship having concluded the reading of his judgment in so far as it was reduced to writing added :] The plaintiffs are entitled to a declaration that the charterparty still continues in force, and to an inquiry as to the damages which they have sustained from the detention of the tug by the defendants from June 1, 1915, to July 16, 1915. As the defendants are desirous of testing the decision in this case, as well as in the former case of *Elliott Steam Tug Co.* v. *Duncan & Sons* (1), they will have leave to appeal, but they must give notice of appeal as soon as possible. There will be a stay of the inquiry as to damages pending the appeal.

The result of the decisions as they at present stand appears to be that when during the continuance of a charterparty the vessel has been requisitioned by the Admiralty, both the charterparty hire and the Admiralty hire are brought into account and an adjustment is made between the owners and the charterers. In the present case it will no doubt be possible to make the adjustment during the inquiry as to damages should that be necessary.

Judgment accordingly.

Solicitors for plaintiffs : *Thomas Cooper & Co.*

Solicitors for defendants : *Holman, Fenwick & Willan.*

(1) 34 T. L. R. 583.

J. R.

1920
Feb. 16, 17;
Mar. 29, 30.

DI FERDINANDO *v.* SIMON, SMITS & COMPANY, LIMITED (1).

Contract—Breach—Damages incurred Abroad—Assessment—Rate of Exchange applicable.

The defendants contracted to carry goods for the plaintiff from this country to Italy and deliver them there on February 10, 1919, but in breach of their contract failed to do so, and converted the goods. In an action by the plaintiff the Court fixed the damages as the value of the goods in Italy on February 10 aforesaid—namely, 190 lire per 100 lbs. :—

Held, that in arriving at the proper equivalent in British currency for the purposes of assessing these damages, the rate of exchange prevailing between the two countries on February 10, 1919, when the breach was committed, and not that prevailing at the date of the judgment, should be adopted.

ACTION in the commercial list tried by Roche J. without a jury.

The plaintiff, an Italian merchant, carrying on business in Milan, Italy, purchased about twenty-five tons of sodium sulphide in this country, and the defendants, a firm of shipping agents and shippers, contracted to carry these goods for the plaintiff and to deliver them in Milan on February 10, 1919. In an action by the plaintiff claiming damages, Roche J. found that in breach of this agreement the defendants had not carried the goods, but had converted them, and he fixed the value of the goods as their value in Italy on February 10 aforesaid—namely, 190 lire per 100 lbs.

In view of the fluctuations in the exchange between Great Britain and Italy, a question arose at the trial as to what rate of exchange was to be adopted in assessing the damages in the currency of this country, that which prevailed on February 10, 1919, which was agreed at 31 lire to the pound, or that prevailing at the date of the judgment, agreed at 62 lire to the pound. Roche J. adjourned the case for argument on this point.

Evidence was given that the defendants had sold the goods for 38*l.* per ton.

Neilson K.C. and *Langton* for the defendants. The rate

(1) Affirmed by C. A. [1920] W. N. 273.

of exchange obtaining to-day should be adopted. The plaintiff should have received in Milan on February 10, 1919, the worth of so many tons of sodium sulphide, and he would calculate that in lire. The defendants broke their contract to so deliver those goods, therefore the plaintiff has lost money in lire. He comes to this country and sues the defendants for damages, and for that purpose has to translate his loss at Milan into sterling, because the only judgment the Court can give is in sterling. Therefore, when he gets judgment, which will be to-day, he will be entitled to recover that amount of sterling which will produce the number of lire he has lost in Milan. Although the lira is not so good to-day as it was on February 10, it is just as good to an Italian living in Italy.

[ROCHE J. No, for an Italian has to live, not in a water-tight compartment, but in relation to the world. Some of his money is spent in Italy and some abroad.]

In Sedgwick on Damages, 9th ed., 1913, vol. i., § 274, the author writes: "Where suit is brought in one country upon a contract payable in a foreign country, the plaintiff must of course recover damages in the currency of the forum litis; and he should recover such amount as will compensate him for his failure to get the foreign money at the time and place of payment. This, generally speaking, is the value of the foreign money in domestic money, estimated at time of payment." The fact that the present case is a claim for damages makes no difference. In support of this passage *Marburg* v. *Marburg* (1) is cited. In that case where a creditor sued for an amount payable to him in a foreign country in the currency of that country, it was held that he was entitled to a sum in dollars, the currency of the country in which he was suing, sufficient, at the rate of exchange obtaining at the date of the judgment, to produce the amount due where it was made payable. The English cases of *Scott* v. *Bevan* (2); *Delegal* v. *Naylor* (3); and *Cash* v. *Kennion* (4)

(1) (1866) 26 Maryland, 8.
(2) (1831) 2 B. & Ad. 78.
(3) (1831) 7 Bing. 460; 5 M. & P. 443.
(4) (1805) 11 Ves. 314.

1920

DI FERDINANDO v. SIMON.

were cited. That case is practically the same as the present case.

In *Kirsch* v. *Allen, Harding & Co.* (1) the plaintiffs, New York merchants, sold milk to the defendants in England, who, in breach of contract, refused to take it. The contract was f.o.b. New York, and the price was fixed in dollars. Roche J. held that the rate of exchange to be adopted in fixing the damages was that obtaining at the date of the judgment. [Story's Conflict of Laws, 8th ed., 1883, § 308, was also referred to.]

Schiller K.C. and *Micklethwait* for the plaintiff. If the argument for the defendants succeeds it will follow, as a result of their breach of contract, that after paying damages to the plaintiff they will make a profit of 8*l.* per ton—for they have since sold the goods for 38*l.* per ton—and will in addition retain about 9*l.* per ton paid for freight. The Court will hesitate before allowing such a result.

In all the cases cited the claim has been for money, and it is obvious that in these cases the exchange at the time of the judgment must be adopted, for otherwise the plaintiff might get more or less money than he claimed. But in the present case no debt is payable in lire in Italy at a certain date to the plaintiff; but on a certain date, February 10, he was entitled to goods with which he might have dealt in the way of business. He has been deprived of that use of the goods by the defendants' breach of contract, and for that they have to compensate him in damages. The day upon which he is to be compensated is the day on which the wrong was committed, for in contemplation of law the matter is treated as if it had come up for adjudication on that day, and the plaintiff must be put into the position he ought to have been in on that day—namely, with means to go into the market to buy an equivalent amount of goods. Therefore the exchange on that day should be taken as the basis. [He was stopped.]

ROCHE J. I disposed of the issues of liability in this matter

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63. Afterwards reversed in the Court of Appeal on a question of fact only: [1920] W. N. 73; 89 L. J. (K. B.) 265; 25 Com. Cas. 174.

on February 17 last, certain matters of figures being reserved for further consideration and further evidence.

The facts of the case need not be recapitulated, and for the purposes of my judgment I need only say this: I found that the defendants, who were carriers or contractors for carriage, were liable to the plaintiff in damages, because, having accepted the plaintiff's goods in London for carriage to Italy they never carried them there at all, but had otherwise dealt with them, and I held that this amounted to a breach of contract, and also to conversion of the goods. I further held that the proper measure of damages was the value of the goods in question on the date when they would have arrived in Italy and at their value in Italy, and fixed that date as February 10, 1919.

The questions I have had to consider have ultimately come to three in number. The first is as to the quantity of goods that would have arrived in Italy. I have fixed that at twenty-five tons. The second is, what was the price on February 10? The evidence as to that has been given by both parties in Italian lire, and I have fixed it at 190 lire per 100 kilos.

There remains the most difficult question of all, and that question arises by reason of the large and extreme variations in the exchange between this country and Italy. The difference between the parties may be very simply illustrated by figures. The plaintiff's case is that on February 10, 1919, and for a considerable period thereafter, the exchange was at the rate of 31 lire to the pound, and this has been agreed between the parties as approximately correct. The defendants contended that the exchange of to-day should be adopted, and that again, for the purposes of this case, has been agreed at 62 lire to the pound.

I have to decide which rate of exchange I am to adopt. I was much impressed by the argument of Mr. Neilson for the defendants, but on reflection I have come to the conclusion that the argument of Mr. Schiller for the plaintiff is correct, and that the exchange to be adopted must be that of 31 lire to the pound. My reason is as follows: The proper problem for the Court is to ascertain

1920

DI FERDINANDO v. SIMON.

Roche J.

what the plaintiff lost by the non-delivery of his goods at the due date. It was not an accident but an incident in the case that the figures were given in lire, but I think that when those figures were given it was, in the circumstances of the present case, the duty of the Court to ask itself: What did that figure of 190 lire per 100 kilos mean in English money? And to arrive at that result I think I must apply the rate of exchange current at that time—that is, 31 lire to the pound, and on that basis the plaintiff must recover.

It has been pointed out that if the defendants' contention were to prevail an odd result would follow. On their contention they would have to pay as damages approximately 30*l.* per ton, while on the basis I have fixed it will be approximately 60*l.* per ton. The defendants have since sold the goods at 38*l.* per ton, so that, on their contention, after they had paid the 30*l.* per ton damages to the plaintiff they would make a profit of 8*l.* per ton, in addition to the money they were paid for undertaking to carry the goods to Italy. The fact that such a result would follow is not my reason for arriving at my decision, but it is some consolation to me to know that I have not been led to a result which has consequences such as that.

Mr. Neilson for the defendants referred me to several cases, English and American. These, however, were all cases where the defendant was indebted to the plaintiff in a sum of money in foreign currency, and the question to be solved was what sum of English money was to be paid in order to satisfy that sum of money in foreign currency. It seems to me that the conclusion is natural if not inevitable that the rate of exchange at the time of suit or judgment must be the rate to be adopted in such circumstances. These cases seem to me, I will not say to throw no light on, but not to be in any way decisive of the present case, which is entirely different. He has also pressed on me my own decision in *Kirsch* v. *Allen, Harding & Co.* (1), but I think that Mr. Schiller has succeeded in convincing me that there is no inconsistency

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.

between the decision which I am now pronouncing and that decision. If he was wrong in so persuading me all I can say is that I prefer my present decision.

Accordingly I give judgment for the plaintiff for a sum calculated on the basis I have stated.

1920

DI FERDINANDO v. SIMON.

Judgment for plaintiff.

Solicitors for plaintiff: *Crosley & Burn.*
Solicitors for defendants: *William A. Crump & Son.*

W. L. L. B.

BARRY AND OTHERS *v.* VAN DEN HURK.

1920
May 17.

[1918. B. 1172.]

Contract—Breach—Damages—Foreign Currency—Rate of Exchange—Date of Conversion.

Where, upon the breach of a contract the person in default—whether seller or buyer—becomes liable for the payment of a sum of money in a foreign currency, the damages, for the purposes of an English judgment, must be assessed as at the date of the default, and the sum payable must be converted into English currency according to the rate of exchange prevailing at that date.

ACTION in the commercial list tried by Bailhache J. without a jury.

In October, 1917, the plaintiffs, who carried on business in New York, sold to the defendant, who carried on business in London, 5000 cases of skimmed sweetened milk at 6.75 dollars per case f.o.b. New York, to be delivered from the factory during December, 1917. Payment nett cash against documents in New York, and therefore payment had to be made in dollars.

The defendant failed to take delivery or to pay for the goods, the final breach taking place on March 6, 1918. The plaintiffs sold against the defendant, and on June 5, 1918, commenced

1920

BARRY v. VAN DEN HURK.

proceedings, claiming 24,530.25 dollars for the defendant's breach of contract, that being the difference between the amount realized on the resale of the cases of milk and the contract price. At the rate of exchange prevailing in March and June, 1918, that number of dollars represented the sum of 5150*l.* 14*s.* 2*d.* in English currency, and the plaintiffs claimed that amount in the statement of claim.

There was considerable delay in bringing the case to trial which was due to a large extent to the fact that evidence was taken on commission in America at the instance of the defendant.

On May 5, 1920, the defendant admitted liability to the plaintiffs in the sum of 5150*l.* 14*s.* 2*d.*, the amount claimed in English currency in the statement of claim. The rate of exchange had however in the meantime depreciated, and the plaintiffs claimed that they were entitled to recover 6289*l.* 16*s.* 2*d.*, that being the sum in English currency which at the rate of exchange prevailing at the date of trial represented 24,530.25 dollars.

The action came on for trial in order to determine the rate of exchange at which the damages in American dollars ought to be converted into English currency.

Neilson K.C. and *J. N. Buchanan* for the plaintiffs. Where an action is brought in the English Courts for the recovery of a sum of money payable in a foreign currency in respect of the breach of a contract, the amount of the English judgment must be expressed in English currency, and in computing the value of the sum of money in foreign currency in English sterling the value must be ascertained according to the rate of exchange at the date of judgment: see *Kirsch & Co.* v. *Allen, Harding & Co.* (1); *Manners* v. *Pearson* (2); *Scott* v. *Bevan* (3); *Marburg* v. *Marburg* (4); Story's Conflict of Laws, 8th ed., § 308. The decision of Roche J. in *Di Ferdinando* v. *Simon* (5), where he held that

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.
(2) [1898] 1 Ch. 581.
(3) (1831) 2 B. & Ad. 78.
(4) (1866) 26 Maryland, 8.
(5) See ante, p. 704.

damages for the non-delivery of goods at the due date must be estimated according to the rate of exchange at the time when the goods should have arrived in Italy, is distinguishable, as that was not a case of non-payment of a sum of money in a foreign currency by a buyer, but a case of damages for non-delivery of goods by the seller.

Patrick Hastings K.C., *Harold Morris* and *Kyffin* for the defendant. The damages in foreign currency for the breach of the contract ought to be assessed as at the date of the breach, and in converting that sum in foreign currency into English sterling the rate of exchange at the date of the breach must also be taken: *Manners* v. *Pearson.* (1) Roche J. preferred his decision in *Di Ferdinando* v. *Simon* (2) to his earlier decision in *Kirsch & Co.* v. *Allen, Harding & Co.* (3) The later decision was right and the earlier decision wrong. In computing the value of damages in a foreign currency to which a plaintiff is entitled, the rate of exchange cannot be taken as at the date of the writ, otherwise the plaintiff might delay commencing proceedings in order to increase his damages, which would not result from the defendant's breach of contract but from the plaintiff's delay. Neither can the date of judgment be the proper date for ascertaining the rate of exchange. If that date were taken the variation in the sum recovered would be due to the law's delay. The true view is that no regard is to be paid to the inevitable delay which takes place between the commencement of proceedings and the date of judgment, and that the damages must be ascertained as at the date of breach.

J. N. Buchanan replied.

BAILHACHE J. This action is brought to recover damages for the failure by the defendant to accept and pay for 5000 cases of skimmed sweetened milk. According to the contract payment was to be made in America in dollars. The defendant was in default, as he did not take delivery and did not pay for the goods. The plaintiffs sold against the defendant, and

(1) [1898] 1 Ch. 581. (2) See ante, p. 704.
(3) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.

1920

BARRY v. VAN DEN HURK.

Bailhache J.

the difference between the amount realized and the contract price amounted to 24,530.25 dollars, which, at the rate of exchange prevailing in June, 1918, was equivalent to 5150*l.* 14*s.* 2*d.* in English sterling. It is conceded that when a judgment is given in the English Courts for the recovery of a sum of money payable in foreign currency in respect of the breach of a contract the amount of the English judgment must be expressed in English currency. The question in this case, where the defendant is in default, is how much ought the plaintiffs to recover in respect of the defendant's breach of contract? There are two possible alternatives: either such a sum in English currency as would produce 24,530 dollars at the rate of exchange prevailing at the date of the breach of the contract, or such a sum in English currency as would produce 24,530 dollars at the rate of exchange prevailing at the date of the judgment. The question is one of some difficulty. Roche J. has had this point before him in two cases, in one of which he accepted one view and in the other case he accepted the other view. In *Di Ferdinando* v. *Simon* (1) he fixed the damages according to the rate of exchange at the time when the goods ought to have been delivered in Italy, while in *Kirsch & Co.* v. *Allen, Harding & Co.* (2) he fixed the damages for the non-payment of certain goods by the buyer according to the rate of exchange prevailing at the date of judgment.

In my view of the law it is immaterial whether it is the seller or the buyer who is in default; in either case the damages must be fixed as at the date of the default, and therefore the sum to be awarded as damages is such a sum in English currency as would at the rate of exchange prevailing at the date of default produce the sum in foreign currency. The plaintiff, whether he be buyer or seller, may issue his writ immediately the breach of contract takes place; the damages are then crystallized, and they do not change afterwards. The rate of exchange between this country and the United States of America varied so slightly before the war that it

(1) See ante, p. 704.

(2) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.

never became necessary to decide this point, but since the war the position has entirely changed. The Courts do not take any account of the necessary delay which must occur before a case is brought to trial. If however there has been an unreasonable delay in bringing an action to trial due to the conduct of the defendant the Courts may give damages in respect of such delay in the form of interest. In my opinion the amount due to the plaintiffs in foreign currency in respect of the defendant's breach of contract must be converted into English currency according to the rate of exchange ruling at the date of the breach, and therefore the proper sum to award to the plaintiffs in this case is 5150*l.* 14*s.* 2*d.* The question is whether I ought to award damages in the form of interest. There has been considerable delay, amounting to nearly two years, in bringing the case to trial. If I had come to the conclusion that the delay was due to the unreasonable conduct of the defendant I should have given interest. In one sense it was unreasonable on his part not to pay for the goods. But upon the whole I think the true view is that the delay in bringing the case to trial not unduly prolonged by the party in default is a delay which the Courts take no account of, and therefore there will be judgment for the plaintiffs for 5150*l.* 14*s.* 2*d.*, but without interest.

Judgment accordingly.

Solicitors for plaintiffs: *Coward and Hawksley, Sons & Chance.*

Solicitors for defendant: *Cosmo Cran & Co.*

R. F. S.

1920 LEBEAUPIN *v.* RICHARD CRISPIN AND COMPANY.

June 2, 18.

Contract—Breach—Failure of Subject-matter—Force Majeure—Damages—Rate of Exchange.

By each of two contracts, each dated May 16, 1917, C. & Co. sold to L. 2500 cases of "British Columbia Fraser river salmon." The first contract had the words, "The salmon to be the first 2500 cases of ½ lb. flat pinks packed by the St. Mungo Cannery, Fraser river, during the season of 1917." The second contract had a similar clause, except that the packing was to be by the Acme Cannery. Each contract had this exception clause: "In the event of the destruction, or partial destruction, of the cannery, plant, or material, or the packing being interfered with, or stopped, or falling short through short run of fish, or through strikes or lock-out of fishermen or workmen, or from any cause not under the control of the canners or shippers . . . . causing non-arrival at destination, the contract to be cancelled in respect of such non-delivery or part non-delivery as the case may be;" also the words in large letters, "Subject to force majeure." In the 1917 season there was an excellent run of fish on the Fraser river. The St. Mungo Co. began to pack the salmon in the ½ lb. tins, but finding that the tins were defective they ceased packing, and before they got a fresh supply of ½ lb. tins the run of salmon had practically ceased. If they had possessed a sufficient supply of good tins they could have secured fish for 2500 cases of ½ lb. flat pinks. The Acme Co. had a full supply of ½ lb. tins, but as they also had a large number of 1 lb. tins which were getting rusty when the fish began to run, they filled them first, and before they could proceed to fill the ½ lb. tins the run of fish had ceased. The cessation of the run was in no way abnormal. No deliveries having been made under the contracts, the buyer claimed damages, and the umpire awarded him 12,500 dollars, to be paid in London at the rate of exchange ruling at the date of the award—namely, February 24, 1920:—

Held (1.), that there was no failure of the subject-matter of the contracts within the principle of *Howell* v. *Coupland* (1874) L. R. 9 Q. B. 462; (1876) 1 Q. B. D. 258 so as to free the sellers from liability; (2.) that the general exception clause did not protect the sellers; (3.) that there was no force majeure which prevented the fulfilment of the contracts; and (4) that the damages, assessed at 12,500 dollars, were payable in London at the rate of exchange ruling upon the date of the breach of contract—namely, September 30, 1917—and not at the rate ruling at the date of the award.

A force majeure clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.

AWARD in the form of a special case.

The following statement of facts is taken from the judgment:

"This award by an umpire in the form of a special case was made by Mr. F. D. Mackinnon K.C. on February 24, 1920. It raises several points of law of novelty and importance. The buyer (M. Lebeaupin) claims damages against the sellers (Richard Crispin & Co.) for breach of contract to deliver a large quantity of tinned salmon.

"There were two contracts; each was dated May 16, 1917, and each was for the supply of 2500 cases of 'British Columbia Fraser river salmon.' The first contract had the following words: 'The salmon to be the first 2500 cases of ½ lb. flat pinks packed by the St. Mungo Cannery, Fraser river, during the season of 1917.' The second contract had these words: 'The salmon to be the first 2500 cases of ½ lb. flat pinks packed by the Acme Cannery, Fraser river, during the season of 1917.' Each contract contained the following exception clause: 'In the event of the destruction, or partial destruction, of the cannery, plant, or material, or the packing being interfered with, or stopped, or falling short through short run of fish, or through strikes or lock-out of fishermen or workmen, or from any cause not under the control of the canners or shippers . . . . causing non-arrival at destination, the contract to be cancelled in respect of such non-delivery or part non-delivery as the case may be.' Then appear in large letters the words, 'subject to force majeure.'

"The sellers failed to deliver any part of the above-mentioned goods to the buyer. They asserted that they were saved from liability for several reasons. The umpire negatived their contentions and awarded substantial damages to the buyer."

Clause 11 of the award was as follows: "I hold that the sellers are not excused under either contract for their failure to deliver. I therefore award that the sellers shall pay to the buyer 12,500 dollars. In accordance with the rule as I understand it to have been laid down by Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (1), I direct that the sellers shall pay this sum to such agent of the buyer as he shall direct in London and in sterling at the rate of

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.

1920

LEBEAUPIN v. CRISPIN.

exchange of sterling for dollars ruling upon the date of this my award."

"The broad facts can be briefly stated. The sellers are merchants in London. To cover themselves upon the present contracts they made contracts with a firm of Evans, Coleman & Evans, also of London, and the latter had in turn made contracts with the St. Mungo Cannery and the Acme Cannery of British Columbia. The terms of the latter contracts were not in evidence before the umpire. The St. Mungo Cannery belongs to the St. Mungo Canning Co. In the season of 1917 there was an excellent run of fish on the Fraser river. The St. Mungo Co. began to pack the salmon into the ½ lb. tins. They then proceeded to prepare the tins as usual by a cooking process, but found that the tins were defective and useless for the desired purpose. Hence they ceased to pack into ½ lb. tins and destroyed the cooking already made. Before they could get a new lot of ½ lb. tins the run of salmon had practically ceased. If they had possessed a sufficient supply of good tins they could have secured fish for 2500 cases of ½ lb. flat pinks. The St. Mungo Co. gave evidence before the umpire to the effect that it was not possible to discover that the tins were defective until pressure was put on them in the process of cooking. Upon this point the umpire says: 'I accept this in the sense that the defects could not be found until the tins were used, and that they had no reason to suspect them until they did use them, but I find that they might have been used and so tested at an earlier date, for example, when they were packing the Toba Inlet fish. There was no evidence of the date or terms of their contract with the American Canning Co., of the date of the delivery of the tins which proved defective. . . . .' Apparently the defective tins had been supplied by the American Canning Co.

"The Acme Cannery belongs to the British Columbia Packers' Association. Ample fish existed in the season of 1917 to enable them to pack 2500 cases of ½ lb. flat pinks. They had a full supply of ½ lb. tins. What happened, however, was this. They had a large number of 1 lb. tins. These were getting rusty when the fish began to run. They therefore

filled the 1 lb. tins first to the extent of over 3700 cases to avoid the loss of those 1 lb. tins. Then ere they could proceed to fill the ½ lb. tins the run of fish ceased and they were unable to prepare ½ lb. tins at all. The cessation of the run was in no way abnormal. Such are the main facts as to the two contracts."

Raeburn K.C. and *Le Quesne* (*D. C. Moncrieff* with them) for the sellers.

Neilson K.C. and *H. I. P. Hallett* for the buyer.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

June 18. McCARDIE J. read his judgment which, after stating the facts set out above, continued as follows: The first contention of the sellers was that by the words, "The salmon to be the first 2500 cases of ½ lb. flat pinks packed by the St. Mungo Cannery, Fraser river, during the season of 1917," and the like words (mutatis mutandis) in the second contract, there was a sale of a specific class of goods actually to be prepared and made by a third person, and that unless that specific class of goods came into existence the sellers were free from liability. They relied on the case of *Howell* v. *Coupland*. (1) There the defendant Coupland agreed to sell "200 tons of regent potatoes grown on land belonging" to Coupland in Whaplode "at the rate of 3*l*. 10*s*. 6*d*. per ton." Owing to the potato blight the crop failed and the defendant was only able to deliver 80 tons. It was held that he was not liable for the non-delivery of the remaining 120 tons. The ground of the decision was given by Blackburn J., who said (2): "The principle of *Taylor v. Caldwell* (3) which was followed in *Appleby* v. *Myers* (4) in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to it perishing without any default in the seller, the delivery is excused. Of course, if the perishing were

(1) L. R. 9 Q. B. 462; affd. 1 Q. B. D. 258.
(2) L. R. 9 Q. B. 465.
(3) (1863) 3 B. & S. 826.
(4) (1867) L. R. 2 C. P. 651.

1920

LEBEAUPIN v. CRISPIN.

McCardie J.

owing to any default of the seller, that would be quite another thing. But here the crop failed entirely owing to the blight, which no skill, care, or diligence of the defendant could prevent." In my opinion the decision in *Howell* v. *Coupland* (1) does not cover the present case. The vendors here must, I think, be treated, for the purposes of the present contracts, as occupying the position of the St. Mungo Cannery Co. and the Acme Cannery Co. They cannot rely on any defence or failure of subject-matter which those companies (if they were defendants to the present proceedings) would be disabled from relying upon. This being so, I point out that it is clear that there was no failure of the fish crop at all. It was indeed larger than usual. The reason for the default was in the one case the omission of the St. Mungo Co. to provide good tins, and was in the other case the deliberate choice of the Acme Co. to pack 1 lb. tins in priority to ½ lb. tins in the hope that an exceptional run of fish would occur. There is no scope here for an application of the *Howell* v. *Coupland* (1) principle. If it were to be applied to such a case as the present, the result would be greatly to impair the obligations of vendors.

The next contention of the sellers was that they were saved from liability by the words of the exception clause, i.e., apart from the special words "subject to force majeure." As to this contention I need not say that if a seller desires to escape from liability in such a case as the present, he must take care to use words of adequate clearness and width. The principle of *Price* v. *Union Lighterage Co.* (2) and *Nelson Line* v. *James Nelson & Sons* (3) applies as much to the documents before me as to shipping documents. The point was cogently put by Lord Macnaghten in *Elderslie Steamship Co.* v. *Borthwick* (4) when he said: "An ambiguous document is no protection." In the present case I think that the exception clause does not, upon any fair interpretation of it, cover the facts here. Indeed, I go further and say that upon the facts here found by the umpire, the non-delivery of the goods in question did in

(1) L. R. 9 Q. B. 462; 1 Q. B. D. 258.

(2) [1904] 1 K. B. 412.

(3) [1908] A. C. 16.

(4) [1905] A. C. 93, 96.

substance arise from causes under the control of the canners or shippers.

The next point raised by Mr. Raeburn and Mr. Le Quesne in their able arguments turned on the words, " Subject to force majeure." This phrase " force majeure " has been introduced into many English commercial contracts within recent years. It is employed not only with increasing frequency, but without any attempt to define its meaning or any effort to co-ordinate the phrase to the other provisions of documents. It is a phrase employed in the Code de Commerce of France. Thus, for example, article 230 of that Code provides : " La responsabilité du capitaine ne cesse que par la preuve d'obstacles de force majeure." The meaning of the phrase as used on the Continent of Europe is discussed in Calvo's Dictionnaire de Droit International, tit. " Force Majeure," and by Dalloz, Jurisprudence Générale, tom. 24, p. 755, article " Force Majeure." A broad statement on the matter appears in Goirand's French Commercial Law, 2nd ed., p. 854. He says : " Force Majeure. This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus, war, inundations, and epidemics, are cases of force majeure ; it has even been decided that a strike of workmen constitutes a case of force majeure." This is a wide definition, but I think that it usefully though loosely suggests not only the meaning of the phrase as used on the Continent, but also the meaning of the phrase as often employed in English contracts. That " war " comes within the meaning of " force majeure " would seem to be the opinion of Swinfen Eady L.J. in *Zinc Corporation* v *Hirsch*. (1) That a strike of workmen comes within the phrase was the opinion of Bailhache J. in *Matsoukis* v. *Priestman*. (2) That learned judge was, if I may respectfully say so, clearly right when he said that the phrase " force majeure " was not interchangeable with " vis major " or " the act of God." It goes beyond the latter phrases. Any direct legislative or administrative interference would of course come

(1) [1916] 1 K. B. 541, 554. (2) [1915] 1 K. B. 681.

1920

LEBEAUPIN v. CRISPIN.

McCardie J.

within the term: for example, an embargo. But even such a thing as a breakdown of machinery through accident was deemed by Bailhache J. to come within the words "force majeure." (See *Matsoukis* v. *Priestman*. (1)) This opinion is agreeable to the view of Walton J. in *Yrazu* v. *Astral Shipping Co.* (2), where he ruled that though a miscalculation of the master and engineer of a ship causing a ship to leave with insufficient coals whereby she was compelled to call at another port and thereby suffered delay and depreciation of cargo was not a case of "force majeure," yet that it would have been a case of "force majeure" if the deficiency of coal had arisen from some accident or casualty. In *Matsoukis' Case* (1) Bailhache J. seems to have ruled that delay caused by bad weather was not within the "force majeure" clause. But he was there dealing with the particular facts, and I conceive that normal bad weather is one thing whereas abnormal tempest, storm or the like may be another thing and might well fall within the "force majeure" clause. The case of *Dixon & Sons* v. *Henderson, Craig & Co.* (3) throws but little light on the matter inasmuch as the "force majeure" clause there dealt with by the Court of Appeal was defined by the words following the heading of "force majeure." But in *The Concadoro* (4) an interesting question arose as to the meaning of "force majeure" in article 2 of the Hague Convention, No. 6 of 1907. Lord Parmoor, in reading the advice of the Privy Council, said (5): "The 'force majeure' contemplated in the article is one which renders the vessel unable to leave the port, and cannot be construed to include the circumstance that the master has not been provided by the owners with sufficient financial resources to continue his voyage." I take it that a "force majeure" clause should be construed in each case with a close attention to the words which precede or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument. Now, applying the above observations to the present case, I point out again that there

(1) [1915] 1 K. B. 681, 687.
(2) (1904) 9 Com. Cas. 100.
(3) [1919] 2 K. B. 778.
(4) [1916] 2 A. C. 199.
(5) Ibid. 202.

was no failure of fish on the Fraser river in 1917. There was no legislative or administrative interference with the canners or shippers; there was nothing in the nature of vis major or actus Dei, and nothing in the nature of a strike, or an accident, or a casualty. All that happened as to the St. Mungo Co. was that they were in default with their tins, and if their contractors (the American Canning Co.) had committed a breach of contract in supplying defective tins, they could presumably have secured damages against them. The Acme Co.'s default arose either through their deliberate choice or their own error of judgment. A man cannot rely on his own act, or negligence, or omission, or default, as "force majeure." See the principle stated by Lord Finlay in *New Zealand Shipping Co.* v. *Société des Ateliers.* (1) However broadly the "force majeure" clause may be interpreted, it could not exonerate the sellers upon the facts of the present case. I am satisfied that when the parties spoke of "force majeure" they never intended those words to include such a case as this. I therefore think that the learned umpire rightly awarded damages to the buyer.

The final point, and an important one, arose upon clause 11 of the award. The following are the words of the umpire: "I hold that the sellers are not excused under either contract for their failure to deliver. I therefore award that the sellers shall pay to the buyer 12,500 dollars. In accordance with the rule as I understand it to have been laid down by Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (2), I direct that the sellers shall pay this sum to such agent of the buyer as he shall direct in London, and in sterling at the rate of exchange of sterling for dollars ruling upon the date of this my award." Now, it was agreed that the date on which the sellers broke their contract to deliver in Vancouver, British Columbia, was September 30, 1917. It was also agreed that the damages were 2.50 dollars per case. A vast difference existed in the rate of exchange between Canada and this country on that date, as compared with the rate on the date of the award—namely, February 24, 1920. The sellers contend that the

(1) [1919] A. C. 1, 6.

(2) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.

1920

LEBEAUPIN v. CRISPIN.

McCardie J.

umpire should have fixed the rate of exchange as on September 30, 1917, and not on the later date. As a result of fixing the latter date, the sellers are exposed to a greater burden to the extent of 1000*l.* inasmuch as, since September 30, 1917, the dollar has risen greatly in value, and sterling has correspondingly fallen. The umpire, I think, rightly interpreted the view of Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (1), where the learned judge said: "I am clearly of opinion that the present time is the time for calculating the exchange, and I direct that dollars shall be converted into pounds sterling at the rate of 4.16 to the £." In that case, however, the defendants appealed (2), and the Court of Appeal held that there was no concluded contract between the parties. Hence they allowed the appeal without dealing with the question of exchange. It is clear, I think, that Roche J. now gravely doubts the correctness of the view he stated in *Kirsch & Co.* v. *Allen Harding & Co.* (1)—see *Di Ferdinando* v. *Simon.* (3) It is equally clear, also, that Bailhache J. differs from the view expressed by Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (1) In *Barry* v. *Van den Hurk* (4) the matter came before Bailhache J. for definite decision. He held that it was immaterial whether it was the buyer or the seller who was in default in carrying out the contract, and that in either case the damages must be fixed as at the date of the default. The plaintiff, he said, whether buyer or seller, might issue his writ immediately the default took place, the damages then crystallized and did not change afterwards, and the Courts did not take account of the inevitable delay which must occur before the trial of the action. Upon principle I venture respectfully to think that the view of Bailhache J. is right. To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of

(1) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 174.
(K. B.) 265; 25 Com. Cas. 63.
(2) [1920] W. N. 73; 89 L. J. (K. B.) 265; 25 Com. Cas. 174.
(3) See ante, p. 704.
(4) See ante, p. 709.

prior cases which occupied the time of the Court, and partly on whether the judge reserved his decision or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory. It would encourage a plaintiff to hasten or postpone the trial according to his view of the money market, and he might gamble on the rate of exchange. If the damages are fixed at the date of breach where the contract is wholly to be performed in England, such also, I think, should be the result where the breach is out of England. There should not be varying rules in such a case. If the damages are once crystallized at the date of breach, then a definite date is given for the ascertainment of exchange, and the amount found payable at the hearing is awarded without regard to the fluctuations of the possible date of trial. This view is, I feel, agreeable to the principle involved in such decisions as *Rodocanachi* v. *Milburn* (1); *Williams* v. *Agius* (2); and *Slater* v. *Hoyle & Smith* (3) (all which were cases of sale of goods), and to the decision in *Jamal* v. *Moolla Dawood* (4) (a case of shares). See also s. 51 of the Sale of Goods Act, 1893. I can see no sound warrant in legal principle for an opposite view. Mr. Neilson, however, vigorously argued that the view of Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (5) was right, in spite of the doubts of Roche J. himself. If the matter fell to be determined by American law, it may well be that I should accede to the arguments of Mr. Neilson. The point would then have to be considered in the light of Story on the Conflict of Laws (ss. 308 to 312) and the cases there cited. Story does not appear to distinguish between non-payment of a debt and non-payment of ordinary damages for breach of contract, and he quotes the case of *Marburg* v. *Marburg* (6), where an American Court held, after citing the English and the American decisions, that in an action in one country for debt made payable in

(1) (1886) 18 Q. B. D. 67.
(2) [1914] A. C. 510.
(3) [1920] 2 K. B. 11.
(4) [1916] 1 A. C. 175.
(5) [1919] W. N. 301.
(6) (1866) 26 Maryland, 8.

1920

LEBEAUPIN v. CRISPIN.

McCardie J.

another country, the plaintiff is entitled to judgment according to the par of exchange at the time of trial or judgment. But I do not think that the American decisions create any imperative rule for the English Courts, and it is clear that they do not distinguish between debt and damages. If I turn to the English decisions, I find indeed that with regard to debt the matter seems at first sight to be settled by *Scott* v. *Bevan* (1), where in an action brought in England for the value of a given sum of Jamaica currency upon a judgment obtained in that island, the Court held that the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. I confess that I find it difficult to follow the ratio of that decision, and I most respectfully concur with Lord Tenterden when he said (2) : " Speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion." Apparently *Scott* v. *Bevan* (1) is regarded by some as conformable to the view of Lord Eldon in *Cash* v. *Kennion*. (3) I venture to take the opposite view. For I see that Lord Eldon said there (4) : " I cannot bring myself to doubt, that, where a man agrees to pay 100*l*. in London upon January 1, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." But the result of *Scott* v. *Bevan* (1) is that a plaintiff, if the rate of exchange is to be taken as at the date of judgment, may get far more or far less, as the case may be, than the amount " he would have had if the contract had been performed." I have read the decision of *Manners* v. *Pearson*. (5) The circumstances there were most unusual, and they gave no real scope for raising the point now before me. The case turned on its special facts, and it was an action for a liquidated sum to be ascertained by an account. It was not an action for damages. The Court held, on the particular facts, that no

(1) (1831) 2 B. & Ad. 78.
(2) Ibid. 85.
(3) (1805) 11 Ves. 314.
(4) Ibid. 316.
(5) [1898] 1 Ch. 581.

debt could be treated as arising till the account had been taken. Hence the point now before me did not really arise, and a close consideration of *Scott* v. *Bevan* (1) became unnecessary. I cannot elicit any guiding principle from *Manners* v. *Pearson* (2) which was, moreover, a case of debt and not of ordinary damages for breach of contract. Whatever may be the rule with regard to a claim for a liquidated sum, I can find no decision, apart from that of Roche J. in *Kirsch & Co.* v. *Allen, Harding & Co.* (3) which indicates that where a claim is made for damages for breach of contract to deliver goods, the date of the judgment, rather than the date of breach, should be taken as the time at which the rate of exchange is to be ascertained. I respectfully adopt the view of Bailhache J. in *Barry* v. *Van den Hurk* (4) and I hold that in the present case the rate of exchange is to be ascertained as at the date of the breach, namely, September 30, 1917, and not at the date of the award. In so holding I think that I shall be really acting upon the present views of Roche J., and probably on the actual opinion of the umpire himself. It follows that clause 11 of the award must be varied as above stated.

With regard to the costs of the special case, the buyer has succeeded in maintaining the award of damages in his favour; the sellers have, however, succeeded in securing an important variation of clause 11 of the award. Justice will be done if I direct that the sellers shall pay to the buyer three-fifths of his costs of this special case.

Award upheld but damages varied.

Solicitors for sellers: *Wilson & Son.*

Solicitors for buyer: *Waterhouse & Co.*

(1) (1831) 2 B. & Ad. 78.
(2) [1898] 1 Ch. 581.
(3) [1919] W. N. 301; 89 L. J. (K. B.) 265; 25 Com. Cas. 63.
(4) See ante, p. 709.

J. S. H.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1920, will be as follows:—

In the First Series,
[1920] 1 Ch. [1920] 2 Ch.

In the Second Series,
[1920] 1 K. B. [1920] 2 K. B. [1920] 3 K. B. [1920] P.

In the Third Series,
[1920] A. C.

INDEX.

ACCEPTANCE—Rent - - - 161
See LANDLORD AND TENANT.

ACCRETION—Sea—Rateability - - 387
See RATES.

ACT OF BANKRUPTCY - - - 426
See BANKRUPTCY.

ACTION—Declaration—Liability to rates
See RATES. 387

—— Government department - - 233
See LIMITATIONS, STATUTES OF.

—— Loss of service - - - - 135
See NEGLIGENCE.

—— Married woman - - - - 243
See MARRIED WOMAN.

ADMISSIBILITY—Evidence—Criminal law
See CRIMINAL LAW. 177, 183

AEROPLANE—Enemy — Damage — Liability of lessee - - - 256
See LANDLORD AND TENANT.

AGENTS—Crown - - - - - 233
See LIMITATIONS, STATUTES OF.

AGRICULTURE—Board of—Small holdings
See SMALL HOLDINGS. 465

ALLOTMENTS - - - - - 465
See SMALL HOLDINGS.

APPEAL—Right of—Inland Revenue Commissioners—Decision of - 612
See REVENUE.

ANTICIPATION—Restraint on - - 243
See JUDGMENT DEBT.

ARBITRATION—Building contract - 169
See BUILDING CONTRACT.

2. —— *Petition of Right—Staying Proceedings—Fiat—Step in the Proceedings—Practice—Petition of Right Act*, 1860 (23 & 24 *Vict. c.* 34), *ss.* 2, 3, 4, 7—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 23. Decision of Bailhache J. affirmed. ANGLO-NEWFOUNDLAND DEVELOPMENT CO. *v.* REX **C. A. 214**

ARCHITECT—Certificate of - - 169
See BUILDING CONTRACT.

ASSESSMENT—Income tax—Super tax 657
See REVENUE.

ASSIGNMENT—Benefit of creditors—Deed
See BANK. 322

—— Reversion - - - - - 106
See LANDLORD AND TENANT.

BANK—Cheques given for racing bets—Indorsement to - - - 346
See GAMING.

2. —— *Lien—Contingent Liability—Customer's Declaration of Insolvency—Deed of Assignment for Benefit of Creditors—Payment of Debts as on Bankruptcy—Secured Creditor—Set Off—Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 30, *sub-ss.* 3, 4, 8; *s.* 31. BAKER *v.* LLOYDS BANK, LD.
Roche J. 322

—— Policy—Insurance—Theft - 537
See INSURANCE (THEFT).

BANKRUPTCY—*Deed of Arrangement — Non-Registration — Invalidity — Trust for Benefit of Creditors—Money received by Trustee of Deed—Death of insolvent Debtor—Estate administered by Official Receiver — Right of Official Receiver to claim Money still in Hands of Trustee of void Instrument—Estoppel — Statutes of Limitation—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *s.* 4, *sub-s.* 2 (*a*) (*b*)—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 130. *In re* LEE. *Ex parte* GRUNWALDT - **Horridge J. 200**

2. —— *Fraudulent Transfer—Transfer of Assets by Bankrupt to Company formed by him—Act of Bankruptcy—Subsequent Transfer to bona fide Purchaser for Value without Notice—Relation back of Trustee's Title—Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1 (*b*). Decision of Horridge J. affirmed. *In re* GUNSBOURG - **C. A. 426**

—— Payment of debts as on - - 322
See BANK.

BASTARDY — *Corroboration — Evidence of —Cumulative Effect of Facts which singly are not Evidence of Corroboration — Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4. THOMAS *v.* JONES
Div. Ct. 399

BETS—Cheques given for - - - 346
See GAMING.

BILL OF COSTS - - - - 333
See SOLICITOR.

BILL OF SALE— *Validity— Accordance with statutory Form — Advance to Third Party— Omission of Grantor's Receipt Clause—Copy filed with Registrar — "True copy"—Statement of Rate of Interest—Omission of Words "per annum"—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9; *Schedule.* BURCHELL *v.* THOMPSON. JOHN E. HARRISON, LD., CLAIMANTS - - C. A. 80

BISHOP—Jurisdiction of - - - 267
See ECCLESIASTICAL LAW.

BOMB—Enemy—Aeroplane—Damage 256
See LANDLORD AND TENANT.

BONUS SHARES - - - - 657
See REVENUE.

BREACH—Charterparty - - - 693
See SHIPPING.

—— Contract - - - 704, 709, 714
See CONTRACT.

—— Covenant - - - - 256, 315
See LANDLORD AND TENANT.

—— Warranty - - - - - - 11
See SALE OF GOODS.

BRIEF—Preparing—Costs - - - 333
See SOLICITOR.

BROKER'S COVER NOTE - - - 1
See SALE OF GOODS.

BUILDING CONTRACT — *Construction — Certificate of Architect — Condition precedent to Right of Action— Arbitration Clause.* EAGLESHAM *v.* MCMASTER
Earl of Reading C.J. 169

BURGLARY—Insurance - - - 366
See INSURANCE.

BUSINESS PREMISES — Insurance—Burglary and housebreaking - 366
See INSURANCE.

CARRIER—*Railway Company—Goods delivered for Carriage improperly packed—Knowledge of Company—Liability for Damage due to defective Packing.* GOULD *v.* SOUTH EASTERN AND CHATHAM RY. CO.
Div. Ct. 186

CASE STATED—Income Tax Commissioners
See REVENUE. 278

CASES:—

—— *Alsager* v. *Currie* (1844) 12 M. & W. 751.
Followed. BAKER *v.* LLOYDS BANK, LD. - - - - - 322

—— *Baldock* v. *Westminster City Council* [1918] W. N. 339; 17 L. G. R. 190.
Considered. CARPENTER *v.* FINSBURY B. C. - - - - - 195

—— *Bedford College* v. *Guest* [1919] 2 K. B. 231.
Affirmed. - - - C. A. 278

—— *Bouch* v. *Sproule* (1887) 12 App. Cas. 385.
Applied. INLAND REV. COMMRS. *v.* BLOTT - - - - C. A. 657

—— *Brinsmead* v. *Harrison* (1871) L. R. 6 C. P. 584.
Applied. *In re* GUNSBOURG
C. A. 426

—— *Clarke* v. *Watson* (1865) 18 C. B. (N. S.) 278.
Followed. EAGLESHAM *v.* MCMASTER 169

—— *Collins* v. *Jones* (1830) 10 B. & C. 777.
Followed. BAKER *v.* LLOYDS BANK, LD. - - - - - 322

—— *Cunningham* v. *Dunn* (1878) 3 C. P. D. 443.
Followed. RALLI BROTHERS *v.* COMPAÑIA NAVIERA SOTA Y AZNAR
C. A. 287

—— *Davis* v. *Garrett* (1830) 6 Bing. 716, 724.
Dictum held inapplicable. ELLIOTT STEAM TUG CO. *v.* PAYNE (JOHN) & CO. - - - - - - 693

—— *Dey* v. *Mayo* [1919] 2 K. B. 622.
Reversed - - - C. A. 346

—— *Ford* v. *Cotesworth* (1870) L. R. 5 Q. B. 544.
Followed. RALLI BROTHERS *v.* COMPAÑIA NAVIERA SOTA Y AZNAR
C. A. 287

—— *Forster* v. *Baker* [1910] 2 K. B. 636.
Followed. ROTHSCHILD *v.* FISHER
C. A. 243

—— *George and Goldsmiths' Insurance Association, In re* [1899] 1 Q. B. 595.
Discussed. CALF AND SUN INSURANCE OFFICE, *In re* C. A. 366

—— *Golding* v. *Bradlaw* [1919] 2 K. B. 238.
Approved. DEY *v.* MAYO C. A. 346

—— *Hall* v. *London, Brighton and South Coast Ry. Co.* (1885) 15 Q. B. D. 505.
Followed. FOSTER *v.* GREAT EASTERN RY. CO. - C. A. 574

—— *Howell* v. *Coupland* (1874) L. R. 9 Q. B. 462; (1876) 1 Q. B. D. 258.
Referred to. LEBEAUPIN *v.* CRISPIN (RICHARD) & CO. - - - 714

CASES—*continued.*

—— *Inland Rev. Commrs.* v. *Blott* [1920] 1 K. B. 114.
Affirmed - - - **C. A. 657**

—— *Inland Rev. Commrs.* v. *Warnes & Co.* [1919] 2 K. B. 444.
Approved. INLAND REV. COMMRS. *v.* VON GLEHN - - **C. A. 553**

—— *Jacobs* v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589.
Considered. RALLI BROTHERS *v.* COMPAÑIA NAVIERA SOTA Y AZNAR **C. A. 287**

—— *Lamley* v. *East Retford Corporation* (1891) 55 J. P. 133.
Considered. CARPENTER *v.* FINSBURY B. C. - - - - - **195**

—— *Livie* v. *Janson* (1810) 12 East, 648.
Commented on and distinguished. WILSON SHIPPING CO., LD. *v.* BRITISH AND FOREIGN INSURANCE CO. - - - - - **C. A. 25**

—— *Lloyd Bros.* v. *Milward* (1895) 2 Hudson's Building Contracts, 262.
Distinguished. EAGLESHAM *v.* MCMASTER - - - - - **169**

—— *Lynn* v. *Bell* (1876) Ir. R. 10 C. L. 487.
Discussed. DEY *v.* MAYO **C. A. 346**

—— *McClelland* v. *Manchester Corporation* [1912] 1 K. B. 118.
Considered. CARPENTER *v.* FINSBURY B. C. - - - - - **195**

—— *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Pidcock & Co.* (1896) 10 Ry. and Can. Traff. Cas. 150.
Commented on. FOSTER *v.* GREAT EASTERN RY. CO. - **C. A. 574**

—— *Mason* v. *Provident Clothing and Supply Co.* [1913] A. C. 724, 745.
Dictum of Lord Moulton in, considered and not followed. ATTWOOD *v.* LAMONT - - - **Div. Ct. 146**

—— *Mersey Docks and Harbour Board* v. *Lucas* (1883) 8 App. Cas. 891.
Followed. PORT OF LONDON AUTHORITY *v.* INLAND REV. COMMRS. **C. A. 612**

—— *Nicholls* v. *Evans* [1914] 1 K. B. 118.
Disapproved in part. DEY *v.* MAYO **C. A. 346**

—— *North Staffordshire Ry. Co.* v. *Salt Union* (1898) 10 Ry. and Can. Traff. Cas. 161.
Followed. FOSTER *v.* GREAT EASTERN RY. CO. - **C. A. 574**

—— *Paradine* v. *Jane* (1647) Aleyn, 26.
Followed. REDMOND *v.* DAINTON **256**

—— *Pennsylvania Co.* v. *Mumford.* [1920] 1 K. B. 314. Affirmed **C. A. 537**

—— *Port of London Authority* v. *Inland Rev. Commrs.* [1919] 2 K. B. 608.
Affirmed on one point and reversed on another - - **C. A. 612**

CASES—*continued.*

—— *Portuguese Consolidated Copper Mines Co., In re* (1889) 42 Ch. D. 160.
Followed. YOUNG *v.* LADIES' IMPERIAL CLUB - - **C. A. 523**

—— *Ralli Brothers* v. *Compañia Naviera Sota y Aznar* [1920] 1 K. B. 614.
Affirmed - - - **C. A. 287**

—— *Reg.* v. *Miard* (1844) 1 Cox C. C. 22.
Direction of Tindal C.J. to the jury in, disapproved. REX *v.* DYMOND (EMILY) - - **C. C. A. 260**

—— *Reigate Union* v. *Croydon Union* (1889) 14 App. Cas. 465, 484.
Dictum of Lord Watson in, disapproved. TENDRING UNION *v.* BRAINTREE UNION - **Div. Ct. 647**

—— *Rex* v. *Inland Rev. Commrs.* [1918] 1 K. B. 143.
Distinguished. PORT OF LONDON AUTHORITY *v.* INLAND REV. COMMRS. - - - **C. A. 612**

—— *Robbins* v. *Inland Rev. Commrs.* [1920] 1 K. B. 51.
Affirmed - - - **C. A. 677**

—— *Robins* v. *Goddard* [1905] 1 K. B. 294.
Distinguished. EAGLESHAM *v.* MCMASTER - - - - **169**

—— *Rodocanachi* v. *Milburn* (1886) 18 Q. B. D. 67.
Followed and applied. SLATER *v.* HOYLE AND SMITH, LD. **C. A. 11**

—— *Roe* v. *Mutual Loan Fund* (1887) 19 Q. B. D. 347.
Distinguished. *In re* LEE. *Ex parte* GRUNWALDT - - **200**

—— *Runtz* v. *Longbourne* (1892) 8 T. L. R. 568.
Distinguished. *In re* LEE. *Ex parte* GRUNWALDT - - - **200**

—— *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330.
Principle of, applied. BELVEDERE FISH GUANO CO. *v.* RAINHAM CHEMICAL WORKS, FELDMAN AND PARTRIDGE - - - **C. A. 487**

—— *Sadd* v. *Griffin* [1908] 2 K. B. 510.
Distinguished. *In re* EDEN. WATKINS *v.* EDEN - - **C. A. 333**

—— *Smyth* v. *Darley* (1849) 2 H. L. C. 789.
Followed. YOUNG *v.* LADIES' IMPERIAL CLUB - - **C. A. 523**

—— *Sowerby* v. *Great Northern Ry. Co.* (1891) 7 Ry. and Can. Traff. Cas. 156.
Followed. FOSTER *v.* GREAT EASTERN RY. CO. - **C. A. 574**

—— *Swan Brewery Co.* v. *The King* [1914] A. C. 231.
Distinguished. INLAND REV. COMMRS. *v.* BLOTT - **C. A. 657**

—— *Wertheim* v. *Chicoutimi Pulp Co.* [1911] A. C. 301.
Distinguished and commented upon. SLATER *v.* HOYLE & SMITH, LD. **C. A. 11**

CASES—*continued.*

—— *Williams* v. *Agius* [1914] A. C. 510. Followed and applied. SLATER *v.* HOYLE & SMITH, LD. - **C. A. 11**

—— *Williamson Film Printing Co.* v. *Inland Rev. Commrs.* [1918] 2 K. B. 720. Distinguished. PORT OF LONDON AUTHORITY *v.* INLAND REV. COMMRS. - - - **C. A. 612**

—— *Wilson, In re* [1916] 1 K. B. 382. Distinguished. *In re* LEE. *Ex parte* GRUNWALDT - - - - 200

—— —— [1916] 2 H. B. R. 70, 81, 82. Dictum of Phillimore L.J. in, applied. *In re* LEE. *Ex parte* GRUNWALDT - - - - 200

—— *Wilson Shipping Co.* v. *British and Foreign Insurance Co.* [1919] 2 K. B. 643. Reversed - - - **C. A. 25**

—— *Young* v. *Ladies' Imperial Club* [1920] 1 K. B. 81. Reversed - - - **C. A. 523**

CERTIFICATE—Architect - - - 169
See BUILDING CONTRACT.

—— Insurance - - - - - 1
See SALE OF GOODS.

CERTIORARI - - - - - - 465
See SMALL HOLDINGS.

CHARACTER—Defendant—Evidence—Criminal law - - - - 179
See CRIMINAL LAW.

CHARGES—Railway - - - - 574
See RAILWAY.

CHARGING ORDER—Costs - - 333
See SOLICITOR.

CHILD—Settlement - - - - 647
See POOR LAW.

CHARTERPARTY - - - 287, 693
See CONFLICT OF LAWS and SHIPPING.

CHEQUES—Given for racing bets - 346
See GAMING.

CHURCH—Consecration - - - 267
See ECCLESIASTICAL LAW.

CLERICAL SUBSCRIPTION ACT, 1865 412
See ECCLESIASTICAL LAW.

CLERK—Ecclesiastical Law—Fitness of
See ECCLESIASTICAL LAW. 472

—— Public service—Information against
See CRIMINAL LAW. 630

CLUB—*Expulsion of Member—Resolution of Committee—Validity—Constitution of Committee.* Decision of Roche J. [1920] 1 K. B. 81 reversed. YOUNG *v.* LADIES' IMPERIAL CLUB, LD. - - - **C. A. 523**

COLLECTION—Bank receiving cheques for
See GAMING. 346

COLLEGE BUILDINGS—House tax - 278
See REVENUE.

COMMITTEE—Club - - - - 523
See CLUB.

COMPULSORY PURCHASE—Land - 465
See SMALL HOLDINGS.

CONDITION—Implied - - - 642
See LANDLORD AND TENANT.

—— Precedent—Right of action - 169
See BUILDING CONTRACT.

CONFLICT OF LAWS—*Shipping—Charterparty — Freight — Foreign Law — Mutual Inability of Charterers and Shipowners — Liability of Charterers.* Decision of Bailhache J. [1920] 1 K. B. 614 affirmed. RALLI BROTHERS *v.* COMPAGÑIA NAVIERA SOTA Y AZNAR - - - - - - **C. A. 287**

CONSECRATION—Church - - - 267
See ECCLESIASTICAL LAW.

CONSTABLE — Service of corporation — Injury to—Action by corporation
See NEGLIGENCE. 135

CONSTRUCTION—Building contract.
See BUILDING CONTRACT. - 169

—— Case stated - - - - - 278
See REVENUE.

—— Policy - - - - - - 537
See INSURANCE (THEFT).

CONTINGENT LIABILITY - - - 322
See BANK.

CONTRACT — *Breach — Damages incurred Abroad — Assessment — Rate of Exchange applicable.* DI FERDINANDO *v.* SIMON, SMITS & CO. - - - - **Roche J. 704**

2. —— *Breach—Damages — Foreign Currency—Rate of Exchange—Date of Conversion.* BARRY *v.* VAN DEN HURK **Bailhache J. 709**

3. —— *Breach—Failure of Subject-matter—Force Majeure—Damages—Rate of Exchange.* LEBEAUPIN *v.* CRISPIN (RICHARD) & CO. - - - - **McCardie J. 714**

—— Building - - - - - - 169
See BUILDING CONTRACT.

—— Interest in—Council - - - 636
See LOCAL GOVERNMENT.

—— Sale of goods.
See SALE OF GOODS.

—— Service - - - - - - 146
See RESTRAINT OF TRADE.

CONVEYANCING ACT, 1881 - - 106
See LANDLORD AND TENANT.

CONVICTION—Habitual criminal - 235
See CRIMINAL LAW.

—— Previous—Evidence of—Criminal law
See CRIMINAL LAW. 177

COPY—Bill of sale - - - - 80
See BILL OF SALE.

CORPORATION — Injury to constable in service of—Action by - - 135
See NEGLIGENCE.

CORROBORATION—Bastardy - - 399
See BASTARDY.

C.I.F. CONTRACT - - - - - 1
See SALE OF GOODS.

COSTS—*Discretion — Trial by Judge without Jury — Successful Defendant — Deprivation of Costs—Practice — Rules of Supreme Court*, 1883, *O.* LXV., *r.* 1. Decision of McCardie J. reversed. RITTER *v.* GODFREY **C. A. 47**

—— Solicitor - - - - - - 333
See SOLICITOR.

COUNCILLOR—Municipal corporation—Interest in contract with council 636
See LOCAL GOVERNMENT.

COUNSEL—Fees—Solicitor - - - 333
See SOLICITOR.

COUNTY COUNCIL — Order of — Small holdings - - - - - 465
See SMALL HOLDINGS.

COVENANT—Breach of - 106, 256, 315
See LANDLORD AND TENANT.

COVER NOTE—Broker's - - 1
See SALE OF GOODS.

CREDITORS—Secured - - - 322
See BANK.

—— Trust for benefit of - - - 200
See BANKRUPTCY.

CRIMINAL LAW—*Evidence — Character of Defendant — Evidence of previous Conviction —Offence later than that for which Defendant is on Trial— Admissibility — Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (ii). REX *v.* WOOD (CHARLES EDWARD) **C. C. A. 179**

2. —— *Evidence — Prisoners jointly indicted—Evidence by one Prisoner—Right of Prosecution to cross-examine to incriminate another Prisoner—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1. REX *v.* PAUL (JAMES). REX *v.* MCFARLANE (ROBERT) **C. C. A. 183**

3. —— *Habitual Criminal — Evidence — Previous Conviction as habitual Criminal— Sentence—Prevention of Crime Act*, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10, *sub-ss.* 1, 2 (*b*). REX *v.* STANLEY (GEORGE) - - **C. C. A. 235**

4. —— *Larceny—Person in Public Service —Information against Clerk in Public Service—Jurisdiction of Justices to proceed summarily—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 12; *First Schedule —Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 17, *sub-s.* 1 (*a*); *sub-s.* 2 (*a*). REX *v.* SUTER. *Ex parte* ATT.-GEN. REX *v.* CUMBERLAND JJ. AND SUTER. *Ex parte* ATT.-GEN. - - - - - **Div. Ct. 630**

CRIMINAL LAW—*continued.*

5. —— *Menaces, Demanding Money with— Reasonable or probable Cause—Honest Belief —Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 29, *sub-s.* 1 (i). REX *v.* DYMOND (EMILY) **C. C. A. 260**

CROSS-EXAMINATION—Defendant - 179, 183
See CRIMINAL LAW.

CROWN—Agents of - - - - - 533
See LIMITATIONS, STATUTES OF.

CURRENCY—Foreign contract—Breach—Damages—Rate of exchange—Date of conversion - - - - 709
See CONTRACT.

CUSTOM—Sale of goods—C.i.f. contract
See SALE OF GOODS. 1

CUSTOMER—Bank - - - - - 322
See BANK.

DAMAGE—Unrepaired—Insurance (marine)
See INSURANCE (MARINE). 25

DAMAGES—Breach—Contract 704, 709, 714
See CONTRACT.

—— Measure of - - - - 135, 693
See NEGLIGENCE and SHIPPING.

—— Sale of goods - - - - - 11
See SALE OF GOODS.

DANGEROUS TRADE - - - 487
See NUISANCE.

DEBTS—Married woman—Contracted before marriage - - - - - 543
See MARRIED WOMAN.

—— Payment of as on bankruptcy - 322
See BANK.

DECLARATION—Insolvency - - 322
See BANK.

—— Liability—Rates - - - 387
See RATES.

DEDUCTIONS—Excess profits duty - 553
See REVENUE.

DEED OF ARRANGEMENT - - 200
See BANKRUPTCY.

DEED OF ASSIGNMENT—Benefit of creditors - - - - - - 322
See BANK.

DEFENCE OF THE REALM REGULATIONS - - - - - 305
See EMERGENCY LEGISLATION.

DEFENDANT—Costs - - - - 47
See COSTS.

—— Cross-examination—Criminal law 179, 183
See CRIMINAL LAW.

DETENTION—Ship - - - - - 693
See SHIPPING.

DISCRETION—Costs - - - - 47
See COSTS.

DOCUMENTS—Shipping - - - 1
See SALE OF GOODS.

DWELLING HOUSE—House duty - 278
See REVENUE.

—— Repair—Covenant.
See LANDLORD AND TENANT.

ECCLESIASTICAL LAW—*Parish Church—Substitution of New Church—Provision of Endowment — Consecration — Validity — Subsequent Transfer of Endowments of old Church—Jurisdiction of Bishop — Church Building Act*, 1845 (8 & 9 *Vict. c.* 70), *s.* 1—*Council of London*, 1102, *sixteenth canon.* SEDGWICK *v.* BOURNE - - **Div. Ct. 267**

2. —— *Presentation—Fitness of Clerk—Practices of Ritual—Legality of—Jurisdiction of Common Law Court to determine—Right of Ordinary to require Discontinuance of Practices as Condition of Institution—Clerical Subscription Act*, 1865 (28 & 29 *Vict. c.* 122), *ss.* 1, 9. GORE-BOOTH *v.* MANCHESTER (BISHOP OF) - - - **Coleridge J. 412**

EMERGENCY LEGISLATION — *Defence of the Realm (Amendment) Act*, 1915 (5 *Geo. 5, c.* 34), *s.* 1, *sub-s.* 7—*Suspension of Trial by Jury — Proclamation ordering — "Special Military Emergency" — Cessation of — Duration of Proclamation—Defence of the Realm Regulations.* REX *v.* WORMWOOD SCRUBBS PRISON (GOVERNOR) **Div. Ct. 305**

ENDOWMENT—New church - - 267
See ECCLESIASTICAL LAW.

ENEMY—Aeroplane — Damage — Liability of lessee - - - - 256
See LANDLORD AND TENANT.

ENTRY—Forcible and violent—Insurance
See INSURANCE. 366

ESTOPPEL—Official receiver - - 200
See BANKRUPTCY.

EVIDENCE—Bastardy - - - 399
See BASTARDY.

—— Criminal law - - 179, 183, 535
See CRIMINAL LAW.

EX STORE - - - - - 329
See SALE OF GOODS.

EXCESS PROFITS DUTY - 553, 612, 677
See REVENUE.

EXCHANGE—Rate of—Contract—Breach
See CONTRACT. 704, 714

EXPIRATION—Term - - - 106
See LANDLORD AND TENANT.

EXPLOSIVES—Manufacture of - - 487
See NUISANCE.

EXPULSION—Member—Club - - 523
See CLUB.

FACT—Question of—House duty - 278
See REVENUE.

FAILURE—Subject-matter—Contract 714
See CONTRACT.

FALSE INVOICE - - - - 395
See FERTILISERS AND FEEDING STUFFS.

FEES—Counsel's—Solicitor - - 333
See SOLICITOR.

FERTILISERS AND FEEDING STUFFS — *Sale of—Giving false Invoice—Prejudice of Purchaser — Fertilisers and Feeding Stuffs Act*, 1906 (6 *Edw.* 7, *c.* 27), *s.* 6, *sub-s.* 1 (*b*). HARVEY & CO. *v.* HEREFORDSHIRE C. C. **Div. Ct. 395**

FIAT—Petition of right - - - 214
See ARBITRATION.

FINANCE ACTS - - - - 657
See REVENUE.

FORCE MAJEURE - - - - 714
See CONTRACT.

FORCIBLE AND VIOLENT ENTRY—Insurance - - - - - - 366
See INSURANCE.

FOREIGN CURRENCY—Contract—Breach—Damages—Rate of exchange—Date of conversion - - - - 709

FOREIGN LAW - - - - - 287
See CONFLICT OF LAWS.

FORFEITURE—Waiver - - - 315
See LANDLORD AND TENANT.

FORM—Statutory — Bill of sale — Accordance with - - - - - 80
See BILL OF SALE.

FRAUDULENT TRANSFER—Bankruptcy
See BANKRUPTCY. 426

FREIGHT - - - - - - 287
See CONFLICT OF LAWS.

GAMING—*Cheques given for Racing Bets—Indorsement in Blank—Banker receiving for Collection — "Indorsee" or "holder" — Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *ss.* 1, 2. Judgment of Avory J. [1919] 2 K. B. 622 reversed. DEY *v.* MAYO **C. A. 346**

GENERAL SALES MANAGER - - 677
See REVENUE.

GOODS—Carriage.
See CARRIER.

—— Sale
See SALE OF GOODS.

GOVERNMENT DEPARTMENT — Action by 233
See LIMITATIONS, STATUTES OF.

HABITUAL CRIMINAL - - 235
See CRIMINAL LAW.

HOLDER—Cheques - - - - 346
See GAMING.

HOLDING OVER—Tenant - - - 161
See LANDLORD AND TENANT.

HONEST BELIEF—Demanding money with menaces—Reasonable or probable cause - - - - - - 260
See CRIMINAL LAW.

HOUSE—Reasonably fit for human habitation - - - - - - 642
See LANDLORD AND TENANT.

HOUSE DUTY - - - - - 278
See REVENUE.

HOUSEBREAKING—Insurance - - 366
See INSURANCE.

HOUSING, TOWN PLANNING, &c., ACT, 1909 - - - - - - 642
See LANDLORD AND TENANT.

HUSBAND AND WIFE.
See MARRIED WOMAN.

ILLEGITIMATE CHILDREN—Under sixteen—Settlement - - - 647
See POOR LAW.

INCOME TAX - - - 278, 553, 657
See REVENUE.

INDICTMENT—Joint - - - 183
See CRIMINAL LAW.

INDORSEE—Cheques - - - 346
See GAMING.

INSOLVENCY—Declaration of - - 322
See BANK.

INSOLVENT ESTATE—Administration of
See BANKRUPTCY. 200

INSTITUTION—Benefice - - - 412
See ECCLESIASTICAL LAW.

INSURANCE (MARINE) — *Partial Loss—Damage unrepaired—Subsequent total Loss—Merger.* Judgment of Bailhache J. [1919] 2 K. B. 643 reversed. WILSON SHIPPING CO. *v.* BRITISH AND FOREIGN INSURANCE CO. **C. A. 25**

—— Sale of goods—Policy of - - 1
See SALE OF GOODS.

INSURANCE (PEACE)—Non-conclusion of peace by given date - - 69
See PEACE.

INSURANCE (THEFT)—*Burglary and House-breaking—Loss by Theft—"Actual forcible and violent entry"—Business Premises—Breaking into Room therein—Entering Room by sliding back Lock with Instrument. In re* CALF AND THE SUN INSURANCE OFFICE **C. A. 366**

2. —— *Lloyds Banks and Trust Companies' Policy—Construction.* Decision of Roche J. [1920] 1 K. B. 314 affirmed. PENNSYLVANIA CO. FOR INSURANCES ON LIVES AND GRANTING ANNUITIES *v.* MUMFORD **C. A. 537**

INTEREST—Contract with council - 636
See LOCAL GOVERNMENT.

—— Statement of rate of—Bill of sale—Copy - - - - - - 80
See BILL OF SALE.

INVOICE—False—Fertilisers and feeding stuffs - - - - - 395
See FERTILISERS AND FEEDING STUFFS.

JOINT INDICTMENT - - - - 183
See CRIMINAL LAW.

JUDGE—Without jury—Discretion—Costs
See COSTS. 47

JUDGMENT DEBT—Married woman - 243
See MARRIED WOMAN.

JURISDICTION—Bishop - - - 267
See ECCLESIASTICAL LAW.

——Common law court—Ritual practices—Legality of - - - - 412
See ECCLESIASTICAL LAW.

—— High Court—Claim for declaration of liability to rates - - - 387
See RATES.

—— Justices - - - - - - 630
See CRIMINAL LAW.

JURY—Trial by—Suspension of - - 305
See EMERGENCY LEGISLATION.

JUSTICES—Jurisdiction - - - 630
See CRIMINAL LAW.

KNOWLEDGE—Carrier—Goods delivered for carriage improperly packed 186
See CARRIER.

LAND SETTLEMENT (FACILITIES) ACT 1919 - - - - - - 465
See SMALL HOLDINGS.

LANDLORD AND TENANT—*Implied Condition—House reasonably fit for Human Habitation—House overrun with Rats—Housing, Town Planning, &c., Act,* 1909 (9 *Edw.* 7, *c.* 44), *ss.* 14, 15. STANTON *v.* SOUTHWICK - - - **Div. Ct. 642**

2. —— *Lease — Covenant to repair — Dwelling-house—Bomb from Enemy Aeroplane—Damage—Liability of Lessee.* REDMOND *v.* DAINTON - - **Darling J. 256**

3. —— *Lease—Expiration of Term—New Quarterly Tenancy—Assignment of Reversion—Covenants to repair—"Covenant therein contained"—Right of Assignee of Reversion to sue for Breaches of Covenant—Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 10, *sub-s.* 1. COLE *v.* KELLY - - **C. A. 106**

4. —— *Rent — Acceptance — Recovery of Possession—Breach of Covenant—Forfeiture—Waiver.* EVANS *v.* ENEVER **Lord Coleridge J. 315**

5. —— *Rent—Acceptance—Tenancy determined by Notice to quit—Tenant holding over—Tender of Rent by Tenant—Acceptance by Landlord otherwise than as Rent—Waiver of Notice.* HARTELL *v.* BLACKLER **Div. Ct. 161**

LARCENY - - - - - - 630
See CRIMINAL LAW.

LEASE.
See LANDLORD AND TENANT.

LEGITIMATE CHILD—Under sixteen—Settlement - - - - 647
See POOR LAW.

LIEN—Bank - - - - - - 322
See BANK.

LIGHTERS—Goods in - - - - 329
See SALE OF GOODS.

LIGHTING—Street - - - - 195
See NEGLIGENCE.

LIMITATIONS, STATUTE OF—*Action by Government Department—Agents of Crown—Whether Statute applies.* H.M. WORKS AND PUBLIC BUILDINGS COMMRS. *v.* PONTYPRIDD MASONIC HALL CO. - **Bankes L.J.** 233

—— Bankruptcy.
See BANKRUPTCY.

LLOYDS POLICY—Banks' and trust companies - - - - - - 537
See INSURANCE (THEFT).

LOCAL GOVERNMENT—*Municipal Corporation—Councillor—Interest in Contract with Council—Penalty—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 12, 41. ENGLAND *v.* INGLIS - - **Div. Ct.** 636

—— Street lighting - - - - 195
See NEGLIGENCE.

LOCAL INQUIRY—Small holdings - 465
See SMALL HOLDINGS.

LONDON—Street—Lighting - - 195
See NEGLIGENCE.

LOSS—Insurance (marine) - - - 25
See INSURANCE (MARINE).

—— Service - - - - - - 135
See NEGLIGENCE.

—— Theft—Insurance - - - 366
See INSURANCE.

—— Trade or business connected with or arising out of - - - 553
See REVENUE.

MANUFACTURERS — High explosives — Liability of - - - - 487
See NUISANCE.

MARKET VALUE—Damages — Sale of goods —Breach of warranty - - 11
See SALE OF GOODS.

MARINE INSURANCE.
See INSURANCE (MARINE).

MARRIED WOMAN—*Debts contracted before Marriage — Settlement — Restraint on Anticipation — Judgment Debt — Marriage after Commencement of Action but before Judgment — Merger — Receiver — Splitting up Judgment Debt — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 19. ROTHSCHILD *v.* FISHER. ROTHSCHILD *v.* FISHER (FISHER, THIRD PARTY) - **C. A.** 243

MEASURE OF DAMAGES—Charterparty—Breach - - - - - 693
See SHIPPING.

—— Contract—Breach - - - 704
See CONTRACT.

—— Loss of service - - - - 135

—— Sale of goods - - - - 11
See SALE OF GOODS.

MEMBER—Club—Expulsion - - 523
See CLUB.

MENACES—Demanding money with - 260
See CRIMINAL LAW.

MERGER—Debt—Judgment - - 243
See MARRIED WOMAN.

—— Insurance (Marine) — Partial loss — Damage unrepaired — Subsequent total loss - - - - - 25
See INSURANCE (MARINE).

METROPOLIS LOCAL MANAGEMENT ACT, 1855 - - - - - - 195
See NEGLIGENCE.

MONEY—In hands of trustee void instrument - - - - - - 200
See BANKRUPTCY.

MUNICIPAL CORPORATION—Councillor—Interest in contract with council—Penalty - - - - - 636
See LOCAL GOVERNMENT.

NEGLIGENCE—*Dangerous Portion of Street insufficiently lighted — Liability of Local Authority—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 130. CARPENTER *v.* FINSBURY B. C. **Shearman J.** 195

—— Dangerous trade - - - 487
See NUISANCE.

2. —— *Measure of Damage—Injury to Constable in Service of Corporation—Action by Corporation against Tortfeasor—Loss of Service—Wages during incapacity—Pension.* BRADFORD CORPORATION *v.* WEBSTER **A. T. Lawrence J.** 135

NEW TENANCY - - - - - 106
See LANDLORD AND TENANT.

NON-REGISTRATION—Deed of arrangement
See BANKRUPTCY. 200

NOTICE TO QUIT—Landlord and tenant 161
See LANDLORD AND TENANT.

NUISANCE—*Negligence—Dangerous Trade —Manufacture of High Explosives—Explosion causing Damage to adjacent Property—Liability of Manufacturers.* Decision of

NUISANCE—*continued.*
Scrutton L.J. sitting as an additional judge of the King's Bench Division affirmed. BELVEDERE FISH GUANO CO. *v.* RAINHAM CHEMICAL WORKS, LD., FELDMAN AND PARTRIDGE. IND, COOPE & CO. *v.* SAME **C. A. 487**

OFFICIAL RECEIVER - - - 200
See BANKRUPTCY.

OMISSION—Words—Bill of sale—Copy 80
See BILL OF SALE.

PACKING—Defective — Liability for damage due to - - - - - - 186
See CARRIER.

PARISH CHURCH - - - - 267
See ECCLESIASTICAL LAW.

PARTIAL LOSS—Insurance (marine) - 25
See INSURANCE (MARINE).

PARTY AGGRIEVED—Certiorari - 465
See SMALL HOLDINGS.

PAYMENT—Against shipping documents
See SALE OF GOODS. 1

PEACE—*Insurance — Risk — Non-conclusion of Peace by given Date—"Termination" of War—Treaty of Peace — Ratification — Termination of the Present War (Definition) Act*, 1918 (8 & 9 *Geo.* 5, *c.* 59), *s.* 1—*Treaty of Peace, June* 28, 1919, *Preamble; Art.* 440 —*Proclamation, July* 1, 1919. KOTZIAS *v.* TYSER - - - - - - **Roche J. 69**

PENALTY—Loss connected with or arising out of trade or business - 553
See REVENUE.

—— Municipal Corporations Act, 1882 636
See LOCAL GOVERNMENT.

PENSION—Constable—Loss of service—Measure of damage - - 135
See NEGLIGENCE.

PETITION OF RIGHT - - - 214
See ARBITRATION.

PIER—Rateability of - - - 387
See RATES.

POLICY—Insurance
See INSURANCE.

POOR LAW—*Settlement—Legitimate Child under Sixteen—Residence of Father in another Union—Removability of Child—Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1 —*Illegitimate Children under Sixteen—Settlement—Settlement derived from Mother—Inquiry into derivative Settlement of Mother—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35. TENDRING UNION *v.* BRAINTREE UNION **Div. Ct. 647**

POOR RATE.
See RATES.

PORT AUTHORITY—Excess profits—Trade or business - - - - - 612
See REVENUE.

POSSESSION—Recovery of - - 315
See LANDLORD AND TENANT.

PRACTICE—Arbitration.
See ARBITRATION.

—— Costs.
See COSTS.

—— Solicitor.
See SOLICITOR.

PRESENTATION—Benefice - - 412
See ECCLESIASTICAL LAW.

PREVENTION OF CRIME ACT, 1908 - 235
See CRIMINAL LAW.

PREVIOUS CONVICTION—Habitual criminal - - - - - - 235
See CRIMINAL LAW.

PRISONER—Cross-examination - 179, 183
See CRIMINAL LAW.

PROCEEDINGS—Stay in - - - 214
See ARBITRATION.

—— Step in - - - - - - 214
See ARBITRATION.

PROCLAMATION - - - - 305
See EMERGENCY LEGISLATION.

PROFITS—Standard of - - - 612
See REVENUE.

PUBLIC SERVICE—Person in—Larceny
See CRIMINAL LAW. 630

PURCHASER—Bona fide for value without notice - - - - - - 426
See BANKRUPTCY.

QUALITY—Warranty—Breach - - 11
See SALE OF GOODS.

QUARTERLY TENANCY - - - 106
See LANDLORD AND TENANT.

QUIT—Notice to - - - - - 161
See LANDLORD AND TENANT.

RACING BETS—Cheques given for - 346
See GAMING.

RAILWAY—Carriage of goods - - 186
See CARRIER.

2. —— *Terminal Charges—"Services rendered by Company at or in connexion with sidings not belonging to company"—Station Accommodation — "Conveyance" — When it ends — Use of Trucks—Great Eastern Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. ccxiv.*), *Sched., ss.* 2, 3, 5—*Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 4. FOSTER BROTHERS *v.* GREAT EASTERN RY. CO. - - - - - - **C. A. 574**

RATE OF EXCHANGE—Contract—Breach *See* CONTRACT. **704, 714**

RATES—*Poor Rate — Solid Stone Pier extending into Sea — Rateability of — "Accretion" — Poor Law Amendment Act*, 1868 (31 & 32 *Vict. c.* 122), *s.* 27—*Claim for Declaration of Liability to Rates—Jurisdiction of High Court to order.* BARWICK *v.* SOUTH EASTERN AND CHATHAM RY. COS. **Darling J. 387**

RATIFICATION—Treaty of Peace - **69** *See* PEACE.

RATS—House overrun with - - **642** *See* LANDLORD AND TENANT.

REASONABLE OR PROBABLE CAUSE — Demanding money with menaces *See* CRIMINAL LAW. **260**

RECEIPT CLAUSE—Omission of—Bill of Sale - - - - - - **80** *See* BILL OF SALE.

RECEIVER—Married woman - - **243** *See* MARRIED WOMAN.

RELATION BACK—Trustee's title—Bankruptcy - - - - **426** *See* BANKRUPTCY.

REMOVABILITY—Child - - - **647** *See* POOR LAW.

RENT—Acceptance of - - - **315** *See* LANDLORD AND TENANT.

REPAIR—Covenant. *See* LANDLORD AND TENANT.

REQUISITION—Ship—Charterparty - **693** *See* SHIPPING.

RESTRAINT OF TRADE—*Contract of Service—Severability of Covenant.* ATTWOOD *v.* LAMONT - - - - - **Div. Ct. 146**

RESTRAINT ON ANTICIPATION - **543** *See* MARRIED WOMAN.

RETAINER—Solicitor - - - **333** *See* SOLICITOR.

REVENUE—*Excess Profits Duty — Income Tax — Deductions — Penalty — "Loss connected with or arising out of" Trade or Business—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Case* 1, *r.* 3. Decision of Rowlatt J. affirmed. INLAND REV. COMMRS. *v.* VON GLEHN (ALEXANDER) & CO. **C. A. 553**

2. —— *Excess Profits Duty—Port Authority —"Trade or business"—Standard of Profits—Right of Appeal—Finance (No. 2) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 40, *sub-s.* 2; *ss.* 43, 45, *sub-s.* 5—*Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68). Decision of Rowlatt J. [1919] 2 K. B. 608 reversed upon one point and affirmed on another. PORT OF LONDON AUTHORITY *v.* INLAND REV. COMMRS. **C. A. 312**

REVENUE—*continued.*

3. —— *Excess Profits Duty—"Trade or business"—Occupation of whole Time Servant — General Sales Manager — Finance (No. 2) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 45, *sub-s.* 2, *Fourth Schedule, Part I., cl.* 5.—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *s.* 49, *sub-ss.* 2, 3. Decision of Rowlatt J. [1920] 1 K. B. 51 affirmed. ROBBINS *v.* INLAND REV. COMMRS. - - **C. A. 677**

4. —— *House Duty—College Buildings—Communication by covered Way—One Dwelling House—Question of Fact to be determined by Commissioners—Case stated—Construction—House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B, r.* 1. Decision of Rowlatt J. [1919] 2 K. B. 231 affirmed on the facts. BEDFORD COLLEGE *v.* GUEST - **C. A. 278**

5. —— *Income Tax—Super Tax—Assessment — Shareholder in Company — Bonus Shares — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 54, 163, 164, 165—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66. Decision of Rowlatt J. [1920] 1 K. B. 114 affirmed. INLAND REV. COMMRS. *v.* BLOTT. SAME *v.* GREENWOOD - - - **C. A. 657**

REVERSION—Assignee of - - - **106** *See* LANDLORD AND TENANT.

RISK—Insurance - - - - **69** *See* INSURANCE.

RITUAL—Practices—Legality of - **412** *See* ECCLESIASTICAL LAW.

RULES AND ORDERS—*Council of London*, 1102, *Sixteenth Canon*: SEDGWICK *v.* BOURNE - - - - 267

—— *Defence of the Realm Regulations*, 14B: REX *v.* WORMWOOD SCRUBBS PRISON (GOVERNOR) - - **Div. Ct. 305**

—— *Peace, Treaty of, June* 28, 1919, *Preamble*; *Art.* 440: KOTZIAS *v.* TYSER - - - - - - **69**

—— *Peace, Treaty of, Proclamation, July* 1, 1919: KOTZIAS *v.* TYSER - - - **69**

—— *Supreme Court, Rules of*, 1883, *Order* LXV., *r.* 1: RITTER *v.* GODFREY **C. A. 47**

SALE—Fertilisers and feeding stuffs - **395** *See* FERTILISERS AND FEEDING STUFFS.

SALE OF GOODS—*Contract—Breach of Warranty of Quality—Measure of Damages—Market Value—Circumstances peculiar to Plaintiff—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 53, *sub-s.* 3. Judgment of Greer J. affirmed. SLATER *v.* HOYLE & SMITH, LD. - - - - **C. A. 11**

2. —— *C.i.f. Contract—Payment against Shipping Documents—Tender of Documents —Policy of Insurance—Broker's Cover Note —Certificate of Insurance—Sufficiency of*

SALE OF GOODS—*continued.*

Tender— Alleged Custom. WILSON, HOLGATE & Co. *v.* BELGIAN GRAIN AND PRODUCE Co. **Bailhache J. 1**

3. —— *Sale "ex store"—Goods in Lighters.* FISHER, REEVES & Co. *v.* ARMOUR & Co. **Bailhache J. 329**

SEA—Accretion from - - - 387
See RATES.

SECURED CREDITOR - - - 322
See BANK.

SENTENCE—Criminal law - - - 235
See CRIMINAL LAW.

SERVANT—Occupation of—Trade or business - - - - - - 677
See REVENUE.

SERVICE—Contract of - - - 146
See RESTRAINT OF TRADE.

—— Loss of - - - - - - 135
See NEGLIGENCE.

SET OFF - - - - - - 322
See BANK.

SETTLEMENT—Poor law - - - 647
See POOR LAW.

—— Property - - - - - - 243
See MARRIED WOMAN.

SEVERABILITY—Covenant - - 146
See RESTRAINT OF TRADE.

SHAREHOLDER—Company — Income tax —Super tax—Assessment— Bonus shares - - - - - - 657
See REVENUE.

SHIPPING — *Charterparty — Termination — Requisition — Breach by Owners—Detention of Vessel from Charterers—Requisition during Breach—Measure of Damages.* ELLIOTT STEAM TUG Co. *v.* PAYNE (JOHN) & Co. **Rowlatt J. 693**

—— Conflict of laws - - - - 287
See CONFLICT OF LAWS.

SHIPPING DOCUMENTS—Payment against
See SALE OF GOODS.

SMALL HOLDINGS— *Allotments— Acquisition of Land — Compulsory Purchase—Local Inquiry—Order of County Council—Need for previous Consent of Board of Agriculture—Validity of Order — Certiorari—Owner of Land—Party aggrieved — Right to Writ—Small Holdings and Allotments Act,* 1908 (8 *Edw.* 7, *c.* 36), *s.* 7; *s.* 39, *sub-ss.* 1, 3; *First Sched., Part I.—Land Settlement (Facilities) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 59), *s.* 1, *sub-s.* 1; *s.* 10. REX *v.* BEDFORDSHIRE C. C. *Ex parte* SEAR - - **Div. Ct. 465**

SOLICITOR—*Charging Order—Bill of Costs —"Costs, charges, and expenses"—Counsel's Fees—Fees not paid before Delivery of Bill—Preparing Brief — Taxation — Practice"— Solicitors Act,* 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37— *Solicitors Act,* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28. Decision of A. T. Lawrence J. affirmed on one point and reversed on another. *In re* EDEN. WATKINS *v.* EDEN - **C. A. 333**

SPECIAL MILITARY EMERGENCY - 305
See EMERGENCY LEGISLATION.

SPLITTING UP—Judgment debt - - 243
See MARRIED WOMAN.

STATION ACCOMMODATION—Charges
See RAILWAY. 574

STATUTES:—

1808.

48 Geo. 3, c. 55 (House Tax), Sched. B, r. 1: BEDFORD COLLEGE *v.* GUEST **C. A. 278**

1835.

5 & 6 Will. 4, c. 41 (Gaming), ss. 1, 2: DEY *v.* MAYO - - **C. A. 346**

1842.

5 & 6 Vict. c. 35 (Income Tax), ss. 40, 54, 163, 164, 165: INLAND REV. COMMRS. *v.* BLOTT. SAME *v.* GREENWOOD - - - - **C. A. 657**

—— —— s. 100, Sched. D, Case 1, r. 3: INLAND REV. COMMRS. *v.* VON GLEHN - - - **C. A. 553**

1843.

6 & 7 Vict. c. 73 (Solicitors), s. 37: *In re* EDEN. WATKINS *v.* EDEN **C. A. 333**

1845.

8 & 9 Vict. c. 70 (Church Building), s. 1: SEDGWICK *v.* BOURNE - - 267

1848.

11 & 12 Vict. c. 111 (Poor Removal), s. 1: TENDRING UNION *v.* BRAINTREE UNION - - - **Div. Ct. 647**

1855.

18 & 19 Vict. c. 120 (Metropolis Local Management), s. 130: CARPENTER *v.* FINSBURY B. C. - - - 195

1860.

23 & 24 Vict. c. 34 (Petition of Right), ss. 2, 3, 4, 7: ANGLO-NEWFOUNDLAND DEVELOPMENT Co. *v.* REX **C. A. 214**

23 & 24 Vict. c. 127 (Solicitors), s. 28: *In re* EDEN. WATKINS *v.* EDEN **C. A. 333**

1865.

28 & 29 Vict. c. 122 (Clerical Subscription), ss. 1, 9: GORE-BOOTH *v.* MANCHESTER (BISHOP OF) - 412

1868.

31 & 32 Vict. c. 122 (Poor Law), s. 27: BARWICK *v.* SOUTH EASTERN AND CHATHAM RY. Cos. - - 387

STATUTES—*continued.*

1872.

35 & 36 Vict. c. 65 (Bastardy), s. 4: THOMAS *v.* JONES **Div. Ct. 399**

1876.

39 & 40 Vict. c. 61 (Divided Parishes and Poor Law Amendment), s. 35: TENDRING UNION *v.* BRAINTREE UNION - - - **Div. Ct. 647**

1878.

41 & 42 Vict. c. 31 (Bills of Sale), s. 10, sub-s. 2: BURCHELL *v.* THOMPSON **C. A. 80**

1879.

42 & 43 Vict. c. 49 (Summary Jurisdiction), s. 12; First Sched.: REX *v.* SUTER. *Ex parte* ATT.-GEN. **Div. Ct. 630**

1881.

44 & 45 Vict. c. 41 (Conveyancing), s. 10, sub-s. 1: COLE *v.* KELLY - **106**

1882.

45 & 46 Vict. c. 43 (Bills of Sale), s. 9, Sched.: BURCHELL *v.* THOMPSON **C. A. 80**

45 & 46 Vict. c. 50 (Municipal Corporations), ss. 12, 41: ENGLAND *v.* INGLIS - - - **Div. Ct. 636**

45 & 46 Vict. c. 75 (Married Women's Property), s. 19: ROTHSCHILD *v.* FISHER - - - - **C. A. 243**

1887.

50 & 51 Vict. c. 57 (Deeds of Arrangement), s. 4, sub-s. 2 (*a*) (*b*): *In re* LEE. *Ex parte* GRUNWALDT **200**

1889.

52 & 53 Vict. c. 49 (Arbitration), ss. 4, 23: ANGLO-NEWFOUNDLAND DEVELOPMENT CO. *v.* REX - - **C. A. 214**

1891.

54 & 55 Vict. c. ccxiv. (Great Eastern Ry. Co. (Rates and Charges) Order Confirmation), Sched., ss. 2, 3, 5: FOSTER BROTHERS *v.* GREAT EASTERN RY. CO. - - - **C. A. 574**

1893.

56 & 57 Vict. c. 71 (Sale of Goods), s. 53, sub-s. 3: SLATER *v.* HOYLE & SMITH, LD. - - - **C. A. 11**

1894.

57 & 58 Vict. c. 54 (Railway and Canal Traffic), s. 4: FOSTER BROTHERS *v.* GREAT EASTERN RY. CO. **C. A. 574**

1898.

61 & 62 Vict. c. 36 (Criminal Evidence), s. 1: REX *v.* PAUL (JAMES). REX *v.* MCFARLANE (ROBERT) **C. C. A. 183**

—— —— s. 1 (*f*) (ii): REX *v.* WOOD (CHARLES EDWARD) - **C. C. A. 179**

STATUTES—*continued.*

1906.

6 Edw. 7, c. 27 (Fertilisers and Feeding Stuffs), s. 6, sub-s. 1 (*b*): HARVEY & CO. *v.* HEREFORDSHIRE C. C. **Div. Ct. 395**

1908.

8 Edw. 7, c. 36 (Small Holdings and Allotments), s. 7; s. 39, sub ss. 1, 3; First Sched., Part I.: REX *v.* BEDFORDSHIRE C. C. *Ex parte* SEAR - - - **Div. Ct. 465**

8 Edw. 7, c. 59 (Prevention of Crime), s. 10, sub-ss. 1, 2 (*b*): REX *v.* STANLEY (GEORGE) **C. C. A. 235**

8 Edw. 7, c. 68 (Port of London): PORT OF LONDON AUTHORITY *v.* INLAND REV. COMMRS. - - **C. A. 612**

1909.

9 Edw. 7, c. 44 (Housing, Town Planning, &c.), ss. 14, 15: STANTON *v.* SOUTHWICK - - **Div. Ct. 642**

1910.

10 Edw. 7, c. 8 (Finance (1909–10)), s. 66: INLAND REV. COMMRS. *v.* BLOIT **C. A. 657**

1914.

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 1, sub-s. 1 (*b*): *In re* GUNSBOURG **C. A. 426**

—— —— s. 30, sub-ss. 3, 4, 8; s. 31: BAKER *v.* LLOYDS BANK, LD. **322**

—— —— s. 130: *In re* LEE. *Ex parte* GRUNWALDT - - - - **200**

5 Geo. 5, c. 8 (Defence of the Realm), s. 1: REX *v.* WORMWOOD SCRUBBS PRISON (GOVERNOR) - - **Div. Ct. 305**

1915.

5 Geo. 5, c. 34 (Defence of the Realm), s. 1, sub-s. 7: REX *v.* WORMWOOD SCRUBBS PRISON (GOVERNOR) **Div. Ct. 305**

5 & 6 Geo. 5, c. 89 (Finance (No. 2)), ss. 38, 39, 40, sub-s. 2; ss. 43, 45, sub-s. 5: PORT OF LONDON AUTHORITY *v.* INLAND REV. COMMRS. **C. A. 612**

—— —— ss. 38, 39, 45, sub-s. 2, Fourth Sched., Part I., cl. 5: ROBBINS *v.* INLAND REV. COMMRS. **C. A. 677**

1916.

6 & 7 Geo. 5, c. 24 (Finance), s. 49, sub-ss. 2, 3: ROBBINS *v.* INLAND REV. COMMRS. - - **C. A. 677**

6 & 7 Geo. 5, c. 50 (Larceny), s. 17, sub-s. 1 (*a*); sub-s. 2 (*a*): REX *v.* SUTER. *Ex parte* ATT.-GEN. **Div. Ct. 630**

—— —— s. 29, sub-s. 1 (i): REX *v.* DYMOND (EMILY) - **C. C. A. 260**

STATUTES—*continued.*

1918.

8 & 9 Geo. 5, c. 59 (Termination of the Present War (Definition)), s. 1: KOTZIAS *v.* TYSER - - 69

1919.

9 & 10 Geo. 5, c. 59 (Land Settlement (Facilities)), s. 1, sub-s. 1; s. 10: REX *v.* BEDFORDSHIRE C. C. *Ex parte* SEAR - - Div. Ct. 465

STATUTES OF LIMITATION - - 200
See BANKRUPTCY.

STATUTORY FORM—Accordance with—Bill of sale - - - - 80
See BILL OF SALE.

STAYING PROCEEDINGS—Arbitration 214
See ARBITRATION.

STEP—Proceedings - - - - 214
See ARBITRATION.

STORE—Sale of goods - - - 329
See SALE OF GOODS.

STREET—Lighting - - - - 195
See NEGLIGENCE.

SUBJECT-MATTER—Failure of—Contract
See CONTRACT. 714

SUMMARY JURISDICTION - - 630
See CRIMINAL LAW.

SUPER TAX - - - - - 657
See REVENUE.

SUSPENSION—Trial by jury - - 305
See EMERGENCY LEGISLATION.

TAXATION—Costs - - - - 333
See SOLICITOR.

TENANT—Landlord and.
See LANDLORD AND TENANT.

TENDER—Documents - - - 1
See SALE OF GOODS.

—— Rent—Tenant - - - - 161
See LANDLORD AND TENANT.

TERM—Expiration of - - - 106
See LANDLORD AND TENANT.

TERMINAL CHARGES - - - 574
See RAILWAY.

TERMINATION—War - - - 69
See PEACE.

THEFT
See CRIMINAL LAW and INSURANCE.

TITLE—Trustee—Bankruptcy - - 426
See BANKRUPTCY.

TOTAL—Loss—Insurance (Marine) - 25
See INSURANCE (MARINE).

TRADE—Restraint of.
See RESTRAINT OF TRADE.

TRADE OR BUSINESS - 553, 612, 677
See REVENUE.

TREATY OF PEACE, 1919 - - - 69
See PEACE.

TRIAL—By jury—Suspension of - 305
See EMERGENCY LEGISLATION.

—— Judge without jury—Costs - 47
See COSTS.

TRUE COPY—Bill of sale - - - 80
See BILL OF SALE.

TRUST COMPANIES—Policy — Insurance—Theft - - - - - 537
See INSURANCE (THEFT).

TRUSTEE—Bankruptcy - - - 426
See BANKRUPTCY.

—— Deed of arrangement - - - 200
See BANKRUPTCY.

VOID INSTRUMENT—Money in hands of trustee of - - - - 200
See BANKRUPTCY.

WAIVER - - - - - 161, 315
See LANDLORD AND TENANT.

WAR—Termination - - - - 69
See PEACE.

WARRANTY—Breach of - - - 11
See SALE OF GOODS.

WIFE.
See MARRIED WOMAN.

WORDS:—

—— "Accretion": BARWICK *v.* SOUTH EASTERN AND CHATHAM RY. COS. 387

—— "Actual forcible and violent entry": CALF AND SUN INSURANCE OFFICE, *In re* - - - - C. A. 366

—— "By them supposed or believed to be in or upon their premises": PENNSYLVANIA CO. *v.* MUMFORD C. A. 537

—— "Conveyance": FOSTER *v.* GREAT EASTERN RY. CO. - - C. A. 574

—— "Costs, charges, and expenses": *In re* EDEN. WATKINS *v.* EDEN C. A. 333

—— "Covenant therein contained": COLE *v.* KELLY - - - C. A. 106

—— "Ex store": FISHER, REEVES & CO. *v.* ARMOUR & CO. - - - - 329

—— "Forcible and violent entry": *In re* CALF AND THE SUN INSURANCE OFFICE - - - C. A. 366

—— "Holder": DEY *v.* MAYO C. A. 346

—— "Indorsee": DEY *v.* MAYO C. A. 346

—— "Interest": ENGLAND *v.* INGLIS Div. Ct. 636

WORDS—*continued.*

—— "Loss connected with or arising out of" trade or business : INLAND REV. COMMRS. *v.* VON GLEHN - **C. A. 553**

—— "Services rendered by company at or in connexion with sidings not belonging to company" : FOSTER *v.* GREAT EASTERN RY. CO. **C. A. 574**

—— "Special military emergency" : REX *v.* WORMWOOD SCRUBBS PRISON (GOVERNOR) - - **Div. Ct. 305**

—— "Store" : FISHER, REEVES & Co. *v.* ARMOUR & Co. - - - **329**

WORDS—*continued.*

—— "Termination" (War) : KOTZIAS *v.* TYSER - - - - - - **69**

—— "Trade or business" : ROBBINS *v.* INLAND REV. COMMRS. - **C. A. 677**

—— "Transit between any houses or places" : PENNSYLVANIA CO. *v.* MUMFORD - - - **C. A. 537**

—— "True copy" : BURCHELL *v.* THOMPSON **C. A. 80**

WRIT—Certiorari - - - - **465**
See SMALL HOLDINGS.

BIBL. LONDIN. UNIV.

W. SPEAIGHT & SONS, LTD., PRINTERS, 98–99, FETTER LANE, LONDON, E.C.

THE

LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

KING'S BENCH DIVISION AND PROBATE DIVISION.

(Including Bankruptcy, Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

1920.—VOL. II. K.B. & P.

2 K.B. (p. 1 to p. 235); P. (p. 97 to p. 171).

PART VI.—JUNE 2.

TABLE OF CASES.

KING'S BENCH DIVISION.

	PAGE
ANGLO-NEWFOUNDLAND DEVELOPMENT CO. *v.* THE KING .. .. C.A.	214
ATTWOOD *v.* LAMONT	146
BRADFORD CORPORATION *v.* WEBSTER	135
BURCHELL *v.* THOMPSON .. C.A.	80
CARPENTER *v.* FINSBURY BOROUGH COUNCIL	195
COLE *v.* KELLY .. .. .. C.A.	106
EAGLESHAM *v.* MCMASTER	169
GOULD *v.* SOUTH EASTERN AND CHATHAM RY. COS.	186
HARTELL *v.* BLACKLER	161
KOTZIAS *v.* TYSER	69
LEE, *In re. Ex parte* GRUNWALDT ..	200
PUBLIC WORKS COMMISSIONERS *v.* PONTYPRIDD MASONIC HALL CO. ..	333
REX *v.* PAUL. REX *v.* MCFARLANE C.C.A.	183
REX *v.* WOOD .. .. .. C.C.A.	179
RITTER *v.* GODFREY .. .. C.A.	47
SLATER *v.* HOYLE & SMITH .. C.A.	11
WILSON, HOLGATE & CO. *v.* BELGIAN GRAIN AND PRODUCE CO.	1
WILSON SHIPPING CO. *v.* BRITISH AND FOREIGN INSURANCE CO. .. C.A.	25

PROBATE DIVISION.

	PAGE
BUTTERWORTH *v.* BUTTERWORTH. COLLINS *v.* COLLINS. BARRATT *v.* BARRATT. HOWELL *v.* HOWELL. ADAMS *v.* ADAMS. ELLWORTHY *v.* ELLWORTHY	126
CRAMP *v.* CRAMP..	158
CRETEFOREST, THE	111
DANUBE II., THE	104
LLANDOVERY CASTLE, THE	119
ST. MARY, NORTHOLT (VICAR AND CHURCHWARDENS) *v.* PARISHIONERS. ST. GEORGE-IN-THE-EAST (RECTOR AND CHURCHWARDENS) *v.* PARISHIONERS	97

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

"THE LAW REPORTS, 1920," for June consist of—

Chancery Division	Part VI.
King's Bench and Probate Divisions	Part VI.
King's Bench Division, Vol. I.	Index.

EDITOR—RT. HON. SIR FREDERICK POLLOCK, BART., K.C.

ASSISTANT EDITOR OF CURRENT DIGEST—J. R. V. MARCHANT, *Barrister-at-Law.*

ASSISTANT EDITORS OF WEEKLY NOTES { FRANK EVANS, F. O. ROBINSON, } *Barristers-at-Law.*

REPORTERS:

House of Lords	H. B. HEMMING,	*Barrister-at-Law.*
Privy Council	A. M. TALBOT,	*Barrister-at-Law.*
Court of Appeal, No. 1 ..	G. A. STREETEN, W. IVIMEY COOK,	*Barristers-at-Law.*
Court of Appeal, No. 2 ..	W. F. BARRY, W. H. GRIFFITH,	*Barristers-at-Law.*
Mr. Justice Eve .. .. AND Mr. Justice Peterson ..	GEORGE MACAN, R. MORRISON,	*Barristers-at-Law.*
Mr. Justice Sargant .. AND Mr. Justice Russell ..	FRANK EVANS, ARTHUR LAWRENCE,	*Barristers-at-Law.*
Mr. Justice Astbury .. AND Mr. Justice P. O. Lawrence	G. R. ALSTON, H. L. FRASER,	*Barristers-at-Law.*
	H. C. GARSIA,	*Barrister-at-Law.*
King's Bench Court of Criminal Appeal Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases.	J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, J. S. HENDERSON, R. F. STUBBING, J. RITCHIE,	*Barristers-at-Law.*
Bankruptcy Cases	J. E. ALDOUS,	*Barrister-at-Law.*
Probate and Divorce ..	J. R. BROOKE,	*Barrister-at-Law.*
Admiralty Cases	E. C. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases ..	C. F. JEMMETT,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

THE LAW REPORTS, 1920 (Unbound).

	£	s.	d.
ENTIRE SERIES (including Statutes, Weekly Notes, and Complete Current Digest)	5	5	0
COMPLETE CURRENT DIGEST, 1920 (a Digest, issued quarterly, of all reported cases) (unbound)	0	15	0
CONSOLIDATED DIGEST, 1865-1890 (in cloth)	2	10	0
DECENNIAL DIGEST, 1891-1900 (in cloth)	1	5	0
DECENNIAL DIGEST, 1901-1910 (in cloth)	1	5	0
WEEKLY NOTES, 1920 (unbound)	1	5	0
INDIAN APPEALS, 1920 (unbound)	1	5	0
INDIAN APPEALS, DIGEST, 1874-1893 (in cloth)	0	11	6

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS, 1919 (7 Vols.).		WEEKLY NOTES, 1919 (1 Vol.).		
			Notes of Cases.	Notes of Cases and Miscellaneous.
Cloth	6s. 0d. per Vol.	Cloth	6s. 6d.	7s. 0d.
Half-Calf	9s. 9d. „	Half-Calf ..	10s. 6d.	11s. 0d.
Half-Morocco ..	10s. 6d. „	Half-Morocco	11s. 6d.	12s. 0d.
Calf	13s. 6d. „	Calf	15s. 0d.	16s. 0d.

When the Subscriber's address is more than four miles from the Law Courts a charge of 4s. 6d. is made for cost of carriage of bound Volumes for the Year.

The back years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes* for 1891-1914 are out of print.

All sums payable to the Council must be prepaid, and (unless a Banker's Order has been given) should be remitted direct to the Secretary.

Cheques and Money Orders should be made payable to the Council and crossed " & Co., not negotiable." *Banker's Commission must be added to the amount of the Subscription, in case of every remittance from Ireland, Scotland, the Isle of Man, the Channel Islands and Abroad, unless the remittance is made payable in London.*

COMMUNICATIONS should be addressed to:

THE SECRETARY, COUNCIL OF LAW REPORTING,
30, Montague Street, London, W.C. 1.

A SUBSCRIBER'S DECISION

regarding the

ENGLISH AND EMPIRE DIGEST.

"I have now had an opportunity of examining THE DIGEST and have come to the conclusion that SOLICITORS WHO DO NOT OBTAIN IT WILL BE AT A CONSIDERABLE DISADVANTAGE AS COMPARED WITH THOSE WHO DO."

Write for Prospectus to :—

BUTTERWORTH & CO., BELL YARD,

(S. S. BOND)

TEMPLE BAR, W.C. 2.

UL 2 6 NOV 1981